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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 139

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER

vs.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 18, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

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1 In United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, EX REL., IGNATZ MEZEI, RELATOR-APPELLEE

AGAINST

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, ELLIS ISLAND, NEW YORK HARBOR, OR ANY OTHER PERSON HAVING THE SAID RELATOR-APPELLEE IN CUSTODY, RESPONDENT-APPELLANT

Statement under rule 15b

This is an appeal from an order of the Honorable Irving R. Kaufman, United States District Judge, entered on December 14, 1951, sustaining the writ of habeas corpus herein and directing the relator's discharge on parole on the conditions therein stated.

No hearing was held on said writ, except that oral argument was had on October 30, 1951. This appeal from the aforesaid order was taken on December 17, 1951. On December 21, 1951, the relator-appellee filed a Notice of Cross Appeal.

There has been no change of parties or attorneys.

October 22, 1951

2 In United States District Court, Southern District of New York

UNITED STATES OF AMERICA, EX REL., IGNATZ MEZEI, RELATOR

AGAINST

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, ELLIS ISLAND, NEW YORK HARBOR, OR ANY OTHER PERSON HAVING THE SAID RELATOR-APPELLEE IN CUSTODY, RESPONDENT

Writ of habeas corpus

The President of the United States of America:

To Edward J. Shaughnessy, District Director, Immigration and Naturalization Service, Ellis Island, New York, or any other person having the said Relator in custody.

GREETINGS: The body of Ignatz Mezei, by you illegally detained and imprisoned, it is said, have you before the District Court of the United States in and for the Southern District of New York, at Room 506 of the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, at 10:30 o'clock in the forenoon thereof of the 26th day

of October, 1951 together with the cause of his detention to
3 undergo and receive what this Court may deem fit and proper in the premises and have you them and there this writ.

Witness, Honorable John C. Knox, Chief Judge of the District Court of the United States in and for the Southern District of New York, this 22nd day of October 1951, and of the Independence of the United States of America the one hundred seventy-sixth year.

WILLIAM V. CONNELL,
Clerk of the District Court of the United States, Southern District of New York.

Writ allowed the 22nd day of October 1951.

SYLVESTER J. RYAN,
United States District Judge.

4 In United States District Court

Petition for Writ

October 17, 1951

To the Honorable Judges of the District Court of the United States, Southern District of New York:

Your Petitioner, Ignatz Mezei, for his petition for a Writ of Habeas Corpus, respectfully alleges:

1. That I am a native of Great Britain, having been born in Gibraltar on May 2, 1897, and I am now 54 years of age.

2. That I arrived in the United States on December 23, 1923, when I was admitted for permanent residence and thereafter I resided in Buffalo without any interruption until May 17, 1948. I am married to an American citizen wife residing in Buffalo.

3. That during the War I worked for the United States Coast Guard, I was an air-raid section warden, I donated blood three times, and I was engaged in selling United States War Bonds.

4. That on or about May 17, 1948, I visited Europe for the purpose of seeing my dying mother but was unable to visit her because I was refused permission to enter Rumania.

5. That thereafter I experienced difficulty in securing an
5 exit permit from Hungary and it was not until January 12, 1950, that I was able to leave that country for the purpose of returning to the United States.

6. That on or about February 9, 1950, I arrived at New York on the S. S. "Isle de France" and I applied for admission to the United States as an immigrant. That at that time I was in pos-

session of appropriate documents authorizing my admission to the United States as a permanent resident.

7. That on or about February 9, 1950, I was temporarily excluded from admission to the United States by an immigration inspector of the New York District.

8. That on May 16, 1950, the Attorney General ordered that my temporary exclusion be made permanent without the right of a hearing before a Board of Special Inquiry on the ground that my entry would be prejudicial to the public interest for security reasons.

9. On information and belief that such order of exclusion without a hearing is only authorized by regulation where based upon information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

10. On information and belief that the primary basis of my exclusion without a hearing is my alleged membership in the International Workers Order, an organization on the Attorney General's proscribed list.

11. That the Supreme Court has held that the listing of this organization on the Attorney General's list without a hearing is improper (Anti-Fascist Committee v. McGrath, 341 U. S. 123 at 134).

6 12. That my membership in the International Workers Order was entirely innocent, solely for the purpose of insurance benefits, and that at no time did I participate in any of the alleged subversive aims which have been attributed to the said organization.

13. Upon information and belief that there is no basis for denying a hearing to me because of confidential information the disclosure of which would be prejudicial to the public interest, and that the Attorney General's decision refusing to grant me a hearing is arbitrary, capricious, contrary to law, erroneous, and illegal.

14. That on July 15, 1950, I was placed on board the S. S. "Isle de France" for the purpose of deportation to France but upon my arrival at France I was refused permission to land and was returned to the United States on the same vessel.

15. That I was again placed on board a vessel of the French Line, the "S. S. Liberte" on November 29, 1950, for the purpose of deportation to France and I was again returned with the ship on December 14, 1950, as the French authorities again refused to accept me as a deportee.

16. That since December 14, 1950, I have been detained at Ellis Island, New York. That my continued detention is illegal.

17. That upon information and belief, the respondent, the District Director of the Immigration and Naturalization Service at

New York made a third attempt to have me shipped to France but the French Line declined to again send me back to that country.

18. That an application was made to the Commissioner of Immigration to authorize my release from custody but the same was refused.

19. That upon information and belief, under the law and the Attorney General's order of exclusion, I am deportable to the country whence I came. That I embarked to the United States from France but that country has definitely refused to accept my return and has requested the United States to allow me to return to my home here.

20. That I have no domicile in any other country except the United States where I have resided for the past 28 years with the exception of a temporary visit to Hungary.

21. Upon information and belief that there is no country which is willing to accept me pursuant to the order of exclusion which has been entered by the Attorney General.

22. That I have no means nor prospects of being able to secure admission into any other country in the World and upon information and belief that no country in the World will accept me in view of the Attorney General's order of exclusion against me.

23. That as a result of the foregoing, unless I am released from custody I will be compelled to spend the rest of my life detained at Ellis Island although I have committed no crime, and without an opportunity to meet the alleged charges which have been placed against me but which the respondent and the Attorney General refuse to disclose to me.

24. That on July 5, 1950, Judge Gregory F. Noonan denied an application made by me for a writ of habeas corpus. This application was dismissed prior to the first attempt of the Attorney General to deport me to France.

25. That on October 15, 1950, a second writ of habeas corpus was sought and at that time the respondent filed an affidavit stating that the French Line was ready and able to effectuate the outstanding order of exclusion. Accordingly the writ was denied by Judge Sylvester Ryan on November 17, 1950.

26. A third writ was brought on February 14, 1951, and again the Immigration authorities alleged that there would be no prolonged delay in connection with effectuating my deportation. Accordingly on March 21, 1951, Judge McGohey directed the dismissal of the writ.

27. That on May 25, 1951, I personally, without the assistance of counsel, requested that a writ issue and the matter was set down for hearing as to whether or not a writ should issue. The court thereafter determined not to issue a writ on my behalf.

28. That despite the prior denial of the writ herein, it is respectfully submitted that a question is presented as to whether or not the Attorney General had authority to deny me an exclusion hearing where it is alleged that the alleged confidential information can be safely disclosed. In addition it should be pointed out that it now definitely appears that there is no place to which I can be deported. In view of the fact that I should not be held in detention for the rest of my life at Ellis Island in a civil matter, I respectfully submit that a writ should now issue to test the legality of my continued detention under these circumstances.

9 29. That the information herein contained has been obtained from the records of the Immigration and Naturalization Service and from my own personal knowledge.

30. That no previous application has been made for a writ of habeas corpus except as hereinbefore set forth.

Wherefore, your petitioner respectfully prays that a Writ of Habeas Corpus issue herein, requiring the respondent to produce before this Honorable Court the body of Ignatz Mezei, the relator herein, together with the cause of his detention, to receive and abide by such order as may be made herein.

(S) IGNATZ MEZEI.

[*Duly sworn to by Ignatz Mezei; jurat omitted in printing.*]

10 In United States District Court

Return to writ of habeas corpus

October 30, 1951

I, Lester Friedman, attorney in the Office of the District Counsel, Immigration and Naturalization Service, United States Department of Justice, hereby certify and make return to the writ of habeas corpus herein, based upon the official records of the Immigration and Naturalization Service, as follows:

1. The relator, Ignatz Mezei, then 53 years of age, an alleged native of Gibraltar, who claims to be now stateless, arrived at the Port of New York on February 9, 1950, on the "SS Ile de France" and applied for admission to the United States as an immigrant. On that date he was temporarily excluded from admission to the United States by an Immigrant Inspector pursuant to the provisions of 8 C. F. R. 175.57.

2. On May 10, 1950, the Attorney General of the United States ordered that the relator's temporary exclusion be made permanent without the right of a hearing before a Board of Special Inquiry since the decision was based upon confidential information, the disclosure of which would be prejudicial to the public interest, under the authority of and pursuant to the provisions of 8 C. F. R.

175.57. Such decision was based upon a finding that the
11 relator was excludable as one whose entry is deemed prejudicial to the public interest for security reasons.

3. On May 23, 1950, a communication was addressed to Mrs. Carol King, who had filed a notice of appearance as attorney for the relator, advising said attorney that the temporary exclusion of the relator under 8 C. F. R. 175.57 had been made permanent by order of the Attorney General.

4. The execution of the exclusion order was stayed by the allowance on May 25, 1950, of a writ of habeas corpus returnable in the United States District Court for the Southern District of New York on May 31, 1950. The said writ was adjourned from time to time at the request of relator's attorney, Gunther Jacobson. The writ of habeas corpus came on to be heard before the Honorable Gregory F. Noonan, United States District Judge, on June 30, 1950. After hearing argument, the aforesaid writ was dismissed and an order to that effect was signed on July 5, 1950.

5. On July 15, 1950, pursuant to the provisions of Section 15 of the Immigration Act of February 5, 1917, as amended (8 U. S. C. 151), the relator was returned to the custody of the transportation company upon whose vessel he arrived in the United States for the execution of the outstanding exclusion order and sailed foreign on the vessel "Ile de France."

6. Upon the relator's arrival in France through the failure of the transportation company to make the necessary arrangements with the French government, the petitioner was not per-
12 mitted to land and return to the United States on the next arrival of the vessel, at which time he was transferred to Ellis Island on August 1, 1950, for safekeeping at the expense of the transportation company, pending arrangements with the French authorities for his acceptance in that country.

7. The French Line, which is owned and operated by the French government, the transportation company upon whose vessel the petitioner arrived, completed arrangements for the return of the relator in accordance with the outstanding exclusion order and was scheduled to remove petitioner in compliance with said order on October 13, 1950. Such arrangements were interrupted by the allowance of a second writ of habeas corpus.

8. The second writ of habeas corpus came on to be heard before the Honorable Sylvester J. Ryan, United States District Judge, who dismissed the same and on November 17, 1950, signed an order dismissing the said writ. That order was filed in this court on November 20, 1950 (Civ. 61-272).

9. On November 29, 1950, the relator again sailed out on the S. S. "Liberte" to France and was returned to the United States

on that vessel on December 14, 1950, inasmuch as the French authorities had again refused permission for him to land in that country. Since December 14, 1950, the petitioner has been detained at Ellis Island for safekeeping at the expense of the transportation company pending final arrangements for the execution of the outstanding exclusion order.

10. On January 16, 1951, the Acting Commissioner of Immigration and Naturalization advised the relator's at-
13 torney that the Immigration Service would not interpose any objection to the relator's departure to any country, at his own expense, provided such departure is effected prior to the date set for his deportation under the exclusion order. The relator is not being detained in the usual sense but is in custody solely to prevent him from gaining entry to the United States in violation of law. He is free to depart from the United States to any country of his own choice.

11. On February 14, 1951, the relator herein sued out a third writ of habeas corpus, which came on to be heard before the Honorable John F. X. McGohey, United States District Judge, on March 9, 1951. This writ of habeas corpus was summarily dismissed by order of the Honorable John F. X. McGohey, filed in this court on March 26, 1951 (Civ. 64–156).

12. On June 6, 1951, the relator caused to be issued an order, directing respondent herein to show cause why a writ should not issue. An affidavit in opposition to the allowance of a further writ of habeas corpus was duly verified on June 7, 1951, and filed in this court. The case then came on for argument before the Honorable Charles A. Dewey, United States District Judge who, by order dated June 12, 1951, denied the petition and disallowed the writ of habeas corpus.

13. After the disposition of the writ of habeas corpus application, the relator was interviewed by an officer of the Immigration and Naturalization Service to whom he stated that he intended to make no further effort to depart from the United States and would do nothing except to attempt to remain in this country.

14 14. On October 11, 1951, the respondent herein was informed by the Central Office of the Immigration and Naturalization Service that the French authorities have refused to permit the relator to land in that country and would not reconsider such decision. By letter dated October 15, 1951, the relator's attorney herein was advised of the refusal of the French authorities to permit his entry into French territory and was further advised that the question of obtaining permission for his return to Hungary has been referred to the Hungarian authorities by the American Legation at Budapest.

15. The United States Department of State is presently negotiating through diplomatic channels abroad with the appropriate Hungarian authorities so that arrangements may be made for the relator's acceptance in that country in the event that he fails to depart from the United States to any other country. In the meantime, the relator is being detained at Ellis Island, New York Harbor, New York for safekeeping in behalf of and at the expense of the transportation company upon whose vessel he arrived.

16. As an excluded alien, the relator is not entitled to parole or bail as a matter of law, particularly since even his temporary release would constitute a security hazard and be prejudicial to the best interests of the United States.

Wherefore, it is respectfully prayed that the writ of habeas corpus herein be dismissed and the relator remanded to the custody of the respondent.

LESTER FRIEDMAN.

Dated New York, N. Y., October 30, 1951.

15 *Relator's exhibit 1*

In United States District Court, Southern District of New York

Civil 70/235

UNITED STATES OF AMERICA, EX REL., IGNATZ MEZEI, RELATOR

AGAINST

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE, ELLIS ISLAND, NEW YORK, OR ANY OTHER PERSON HAVING THE SAID RELATOR IN CUSTODY, RESPONDENT

DISTRICT OF COLUMBIA,

City of Washington, ss:

Alexander Glattstein, being duly sworn, deposes and says:

1. I reside at 2217 M Street NE., Washington, D. C. I was born in Hungary and I attended Stephan Tisza University of Debrecen where I secured my degree as doctor of laws in June of 1940. Thereafter I was forced to leave from Hungary in 1943.

2. I am acquainted with the citizenship and expatriation laws of Hungary as they existed until 1943. The law which was in force and effect in Hungary during the period of my residence there was the law of December 20, 1879, which governed the acquisition and loss of Hungarian citizenship.

16 3. Hungarian citizenship may be obtained in four ways; First by birth of Hungarian parents; second by legitimation; third, by marriage; and fourth, by naturalization after five years residence. In my opinion, if Ignatz Mezei was born in Gibraltar but had parents who were Hungarian citizens at the time of his birth, then he would have been a Hungarian citizen at birth himself. The provisions governing the acquisition of Hungarian citizenship are set forth at pages 337 and 338 of "Flournoy and Hudson" Nationality Laws.

4. The provisions with regard to the loss of Hungarian citizenship are set forth in "Flournoy and Hudson" Nationality Laws at page 339. As will be noted, there are five ways in which citizenship may be lost. Article 31 of the law of December 20, 1879, provides as follows:

"Absence.—Hungarian citizens, being absent uninterruptedly from the territory of Hungary for more than 10 years without the authorization of a Hungarian Cabinet Minister or of an Austro-Hungarian Minister, shall lose their citizenship.

"The period of absence shall be counted from the day on which the person in question leaves the country without notifying the authorities as specified in article 9 of his intention to retain his citizenship, or if the person left the country with a passport, the period of absence shall be counted from the expiration of his passport.

"The continuity of absence is broken if the absentee notifies the proper authorities of his intention to maintain his Hun-
17 garian citizenship, or if a new passport has been secured, or in lieu of it a permit of stay has been granted by an Austro-Hungarian Consul, or if the absentee has been registered in a Consulate abroad."

5. It is my understanding that Ignatz Mezei arrived in the United States on December 23, 1923, and he remained in the United States without interruption until May 17, 1948. Assuming that he did not have the authorization of a Hungarian Cabinet Minister or of an Austro-Hungarian Minister to remain abroad, and assuming that during this period he secured no Hungarian passport and also did not notify the Hungarian authorities of his intention to remain a Hungarian citizen, it is my opinion that even if he were at any time a Hungarian citizen, then on December 23, 1933, he lost whatever claim he may have had to Hungarian citizenship.

(S) Alexander Glattstein.

Subscribed and sworn to before me this 26th day of October 1951.

(S) John A. Hummer,
John A. Hummer,
Notary Public D. C.

18 *Relator's exhibit 2*

PB/RBS

No. 280/PA 1553

WASHINGTON, *le September 27, 1951.*

Ambassade de France aux Etats-Unis:

DEAR MR. WASSERMAN: In reference to your letter of September 19, I wish to remind you that Mr. Ignatz Mezei is holder of an affidavit in lieu of passport, which was issued to him on December 1, 1949, by the American Consul in Budapest and on which is stamped an Immigration visa No. 27, charged against the British quota.

Mr. Mezei never resided in France and was there in transit only. As far as I know, he never expressed the intention to go to France in order to stay in that country.

Since he did not hold the proper visa, Mr. Mezei was barred twice from entering into France.

The French Embassy has asked to the Department of State, in a note dated February 1, 1951, to intervene with the Immigration Authorities in order that Mr. Mezei may be permitted to enter the United States.

Sincerely yours,

(S) P I Basdevant,
PIERRE BASDEVANT,
Secretary of Embassy.

Mr. JACK WASSERMAN,
Counselor at Law,
Warner Building, Washington 4, D. C.

19 *Relator's exhibit 3*

I. b. 31

Alien's Order, 1920

To the Alien:

Leave to land has been refused in the case of the alien passenger named Ignatz Mezei, a subject of ? brought to the Port of Plymouth in the ship "Ile de France" from the Port of New York. Grounds of refusal: Art. 15 (1), art. 1 (3) (2). Alien's Order 1920. His dependents who have also been refused leave to land are ————.

Signature of Immigration Officer (Illegible).
Immigration Officer's Stamp (Immigration Officer).
(4).
21 Jul 1950, PLYMOUTH.

20 *Relator's exhibit 4*

French Line, Compagnie Générale Transatlantique, 17 State Street, New York 4, N. Y. Cable Address: Transat. Telephone HAnover 2-8300.

OCTOBER 4, 1951.

LAMBERT O'DONNELL, Esq.,
957 Warner Building, Washington 4, D. C.

Re: Ignaz Mezei—Detained at Ellis Island

DEAR MR. O'DONNELL: This will serve to certify the following facts relative to Ignaz Mezei who has been denied admission into the United States and is presently being detained at Ellis Island, New York.

On February 2nd, 1950, Ignaz Mezei was permitted to board the S. S. "Ile de France" at the port of Le Havre, France, for transportation to New York. He was possessed of an affidavit in lieu of a passport to which a quota visa, application No. I-574.838, was affixed which had been duly issued to him by the American Consulate at Budapest on December 1st, 1949.

Upon his arrival at the Port of New York aboard the S. S. "Ile de France," Mr. Mezei was transferred to Ellis Island by the United States Immigration authorities for examination. Thereafter, on July 12, 1950, he was ordered deported by said United States Immigration authorities and was placed aboard the S. S. "Ile de France" which left New York on July 15th, 1950.

21 Pursuant to the deportation order issued by the Immigration authorities, Mezei was to be deported to England since he was found to have been born aboard a British vessel in British waters. Upon arrival of the S. S. "Ile de France" at the port of Plymouth, England on July 21st, 1950, attempt was made to land him. However, the British authorities denied his admission refusing to recognize Mezei as a British subject. The S. S. "Ile de France" departed from said port the same day being obliged, therefore, to maintain Mezei aboard. When the vessel reached the port of Le Harve, France, further attempt was made by our company to have him land and be admitted in France. The French authorities, however, also refused his admission since he was not a French subject and was not possessed with a visa authorizing his admission to France. Our Home Office at Paris solicited the assistance of the French Merchant Marine Administration which in turn intervened and went before the French Ministry of the Interior to try to have Mezei admitted, but to no avail.

Mr. Mezei, therefore remained on board until the vessel sailed from Le Havre on July 26th, 1950, bound for New York. Upon

arrival in New York on August 1st, 1950, Mezei was once again detained at Ellis Island by the United States Immigration authorities for reexamination of his case.

Thereafter efforts were made to assist Mezei in establishing that he is a British subject. Our representative helped to arrange and assisted at meetings between the British Consul of New York and Mezei. The latter was not, however, able to prove to the British Consul's satisfaction that he was a British subject.

Our Home Office also solicited the assistance of the Paris representatives of the O. I. R. (International Refugee Organization) who in turn referred the matter to the Director General of said organization at Geneva and to its delegate at Washington, D. C.

Thereafter, on November 29th, 1950, he was ordered deported on the S. S. "Liberte." Upon arrival of the vessel at the port of Le Harve, France, further efforts were made by our company to permit his admission in said country. The Minister of the Interior was reapproached but all efforts to have Mezei admitted were unsuccessful. The French authorities refused to allow him to land and we were therefore obliged to keep him on board and return him to the port of New York where the S. S. "Liberte" arrived on December 14th, 1950. Once again he was taken into custody by the United States Immigration authorities and detained at Ellis Island where he continues to remain.

Our representatives have approached consulates of various European nations with view to the issuance of a visa on behalf of Mezei, but here again all efforts have been fruitless.

We sincerely trust that you will be able to work out a satisfactory solution to release our company of this intolerable situation in which we find ourselves involved through no fault on our part.

Yours very truly,

(Signed) C. Di Maria,
C. Di Maria,
Manager, Legal Department.

Dear

Relator's exhibit 5

[Emblem]

CONSULATE GENERAL OF COSTA RICA,
420 LEXINGTON AVE., NEW YORK, N. Y.,
August 13, 1951.

DEAR SIRS: In answer to yours of Aug. 10, 1951, we are sorry to inform you that we cannot give you a visa to enter Costa Rica.

Very truly yours,

[SEAL] CONSULATE GENERAL OF COSTA RICA,

BY: ——— ———

24 *Relator's exhibit 6*

No. 1703/1209

CONSULADO GENERAL DE CHILE,
61 BROADWAY, NEW YORK 6, N. Y.,
August 16th, 1951.

Mr. IGNATZ MEZEI,
O. R. F., Ellis Island.

DEAR SIR: In reply to your letter of the 10th instant, we are sorry to inform you that we cannot grant visas except under instructions from our Foreign Office.

Yours very truly,

(Signed) C. de la Barra,
CARLOS DE LA BARRA,
Dept. Consul General.

25 *Relator's exhibit 7*

[Emblem]

Consulado

Forma 102

Number: 2411

File: 73–32/ 524.4.M.

Ref: deportation

NEW YORK, N. Y., *August 13, 1951.*

Mr. IGNATZ MEZEI,
Ellis Island, N. Y. Harbor, N. Y.

DEAR SIR: This is in reply of your letter of August 10, ult.

I regret to inform you that, according to Mexican Immigration law any person deported from other country, not matter their nationality, cannot allow to go into Mexico on any of our Immigration sections.

Yours very truly,

(Signed) J. L. de Larrea,
Dr. JOSÉ LELO DE LARREA,
General Consul of Mexico.

JLL/fgo.

26 *Relator's exhibit 8*

DL No. 08015

CONSULADO GENERAL DE COLOMBIA,
444 MADISON AVENUE, NUEVA YORK 22, N. Y.,
August 16, 1951.

Mr. IGNATZ MEZEI,
O. R. F., Ellis Island, N. Y.

DEAR SIR: In answer to your letter of August 10th, we regret to advise you that under the present Immigration laws of Colombia, it is not possible to give you a visa to enter our country.

Very truly, yours,

(Signed) L. Carreño,
LUIS CARREÑO,
Consul General of Colombia.

ag.

27 *Relator's exhibit 9*

INM. 3901

CARACAS, 21 DE NOVIEMBRE DE 1.950,
141° y 92°,

Señor IGNATZ MEZEI,
387 Mackinow Street,
Buffalo 10, New York, U. S. A.

Avísole recibo de su correspondencia del 1° de los corrientes, y en atención a lo que enella expresa, le manifesto que por los momentos no se puede acceder a sus deseos.

DIOS Y FEDERACIÓN,
Por el Presidente.

VINCENCIO BAEZ FINOL,
Jefe del Depto.

VBF/et.
o. y cc.
Venezuela

28 *Relator's exhibit 10*

CONSULADO GENERAL DE EL SALVADOR

270 BROADWAY, NEW YORK

No. 672

A–125.61 & 855

NEW ADDRESS:
55 WEST 42ND STREET, NEW YORK 18, N. Y.,
August 28, 1951.

Mr. IGNATZ MEZEI,
O. R. F., Ellis Island, New York.

DEAR SIR: In reply to your letter of August the 11th, I am sorry to inform you that we are not in a position to issue you a visa like the one you request.

Very truly yours,

(Signed) F. Trabanino,
FERNANDO TRABANINO,
Consul General.

JRS/mmh.

29 *Relator's exhibit 11*

CONSULADO GENERAL DE PANAMA,
30 ROCKEFELLER PLAZA, NEW YORK,
August 24, 1951.

Mr. IGNATZ MEZEI,
O. R. F., Ellis Island, New York.

DEAR SIR: In reply to your letter of August 13, I am sorry to inform you that the Immigration Laws of Panama do not authorize me to grant you a visa.

Yours truly,

(Signed) Guillermo de la Guardia,
GUILLERMO DE LA GUARDIA,
Consul General.

30 *Relator's exhibit 12*

759/951

CONSULADO GENERAL DEL URUGUAY,
New York, August 20, 1951.

Mr. IGNATZ MEZEI,
O. R. F., Ellis Island, N. Y.

DEAR SIR: With reference to your letter of August 13, 1951, I regret to inform you that, according to our Laws of Immigration, you cannot apply for a visa of any kind to enter Uruguay.

Very truly yours,

(Signed) Juan F. Domínguez,
JUAN F. DOMÍNGUEZ,
Consul General.

31 *Relator's exhibit 13*

No. 789/511.141

10 ROCKEFELLER PLAZA, NEW YORK 20, N. Y.,
August 16th, 1951.

Mr. IGNATZ MEZEI,
O. R. F., Ellis Island, New York.

DEAR SIR: In reply to your letter of August 9th, I regret to inform you that this Consulate cannot grant the visa that you have requested.

Yours very truly,
(Signed) (Illegible),
p. RAYMUNDO N. LOYOLA DE CASTRO,
Vice consul of Brazil.

MTJ.

32 *Relator's exhibit 14*

CONSULADO GENERAL DE BOLIVIA,
10 Rockefeller Plaza, New York 20, N. Y.

Regret to advise you that your request has not been accepted.

[SEAL].

33 *Relator's exhibit 15*

[Emblem]

WHitehall 4-2784-5

CONSLAT DE LA REPUBLIQUE D'HAITI,
32 BROADWAY, NEW YORK 4, N. Y.,
August 14, 1951.

Mr. IGNATZ MEZEI,
O. R. F., Ellis Island, N. Y.

DEAR SIR: Referring to your request of August 13th, we are sorry to state that you will be unable to secure a visa for Haiti.

Yours very truly,

(Signed) Louis Decatrel,
LOUIS DECATREL,
Consul General.

LD/ga.

34 *Relator's exhibit 16*

[Emblem]

0932

CONSULADO GENERAL DE GUATEMALA,
30 ROCKEFELLER PLAZA, NEW YORK 20, N. Y.,
August 13, 1951.

MR. IGNATZ MEZEI,
O. R. F., Ellis Island, N. Y.

DEAR SIR: In reply to your letter of August 11, 1951, I regret to advise that this Consulate is in no position to issue you a visa to go to Guatemala, unless authorized to do so by our State Department, to which we would have to consult. To do so, it would be necessary for you to appear in person at this Consulate, and to fill out the special forms we have for this purpose, to which three photographs would have to be attached. All this procedure would take from twenty days up, most likely up.

It would also be required of you to show that you have sufficient funds to take care of your immediate needs, and state what you intend to do for your living while in Guatemala.

Very truly yours,

(Signed) Mario G. Ramirez,
MARIO G. RAMIREZ,
Consul General.

mgr/mi.

35 *Relator's exhibit 17*

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

Washington 25, D. C.

Please address reply to and refer to this file No. A-2024778.

OCTOBER 15, 1951.

JACK WASSERMAN,
Counselor at Law,
Warner Building, Washington 4, D. C.

DEAR SIR: This will refer to your recent visit to the Central Office concerning your application for the release on bond or parole of Mr. Ignatz Mezei, who is presently detained at Ellis Island under an outstanding excluding order.

A review of the records in this case shows that Mr. Mezei was temporarily excluded under the provisions of 175.57 (a), Title 8, Code of Federal Regulations. On May 10, 1950, the Attorney General entered an order stating that upon consideration of the report submitted in accordance with law, it had been determined on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, that Mr. Mezei is excludable as one whose entry is deemed prejudicial to the public interest. This order denied him a hearing before a
36 Board of Special Inquiry and directed that his temporary exclusion be made permanent under 8 CFR 175.57 (b). As a result of this order, he was deported on the S. S. "Ile de France" on July 15, 1950.

Upon Mr. Mezei's arrival at Le Havre, France, he was refused permission to land. He was returned to the United States on the same vessel. He was again deported on the S. S. "Liberte" on November 29, 1950, but returned with this ship on December 14, 1950, as the French authorities again refused permission for him to enter France. Since December 14, 1950, Mr. Mezei has been held for safekeeping at Ellis Island, New York.

In view of the circumstances in this case the Service requested the Department of State to make representations to the appropriate officials of the French Government looking toward the return of Mr. Mezei to France, the country from which he embarked to the United States and, at the same time, the State Department was requested to make representations to the Hungarian authorities for permission for Mr. Mezei's return to Hungary, the country of his nationality.

With respect to the representations made to the French authorities, Mr. Mezei was refused permission for entry into French territory. However, with regard to obtaining permission for his return to Hungary, that request has been referred to the Hungarian authorities by the American Legation at Budapest, and we are now awaiting a decision.

Your application, together with the information furnished by you, has received the most careful consideration. However,
37 it has been concluded that on the basis of confidential information contained in our files we are unable to take favorable action upon your request for his release on bond or parole.

The Service proposes to proceed with the deportation of Mr. Mezei as soon as such action becomes practicable, unless he arranges to depart from the United States under the excluding order prior to the completion of arrangements for his deportation.

Very truly yours,

(Signed) W. F. Kelly,
W. F. KELLY,
Assistant Commissioner, Enforcement Division.

38 November 9, 1951

In United States District Court, Southern District of New York

Civ. 70-235

[Same title]

Opinion by Irving R. Kaufman, D. J.

Appearances: Jack Wasserman, Attorney for Relator, Warner Building, Washington 4, D. C. Myles J. Lane, United States Attorney for the Southern District of New York, Attorney for Respondent. William J. Sexton, Assistant United States Attorney, Of Counsel.

IRVING R. KAUFMAN, *D. J.*

Mezei was excluded from the United States for undisclosed security reasons on February 9, 1950. He has been detained at Ellis Island for 21 months while the government has failed in efforts to deport him. No foreign government has shown a willingness to allow his entry. He now seeks a writ of habeas corpus, claiming that he has been detained an unreasonable period of time.
39 The case presents the vexatious problem of what to do with an alien who has no place to go.

There is a certain vagueness about Mezei's history. His parents were either Hungarian or Roumanian—there is some doubt—but he claims that he was born on Gibraltar and is therefore a British citizen. He came to the United States in 1923 and remained here until 1948. The government alleges that he was never lawfully admitted to the United States for permanent residence but this objection seems meaningless now since it is obvious that the government took no action against him in that earlier residence period. He is married to an American citizen, and during World War II he participated in various patriotic activities which he describes generally as work for the Coast Guard, air-raid warden, blood donor, and selling United States war bonds, though he does not indicate with what vigor he pursued these endeavors. Without much doubt his conduct as a resident alien between 1923 and 1948 was unexceptional. On May 17, 1948, Mezei went to Europe to see his dying mother, who, he says, lived in Roumania. He reached Hungary, but claims he was unable to gain admittance to Roumania, and returned to the United States in February 1950 after experiencing difficulty in gaining exit from Hungary. On February 9, 1950, he was transferred from the French liner Ile de France to Ellis Island on a temporary exclusion order under 8 Code of Federal Regulations 175.57.[1] The Attorney General entered a permanent exclusion order on May 10, 1950, without hearing. Thereafter, until this time, the government has made fruitless efforts to deport Mezei. Twice he was turned over to the French Line for return to France. Each time France refused to accept him. Except for those periods of transit—in July 1950 and November 1950—he has been detained at Ellis Island, an elapsed period of almost 21 months. Mezei has brought four earlier writs in this case. Each one was denied, apparently upon advice from the government that it was prepared to effectuate his deportation. At this time the government substantially admits an inability to deport Mezei. England rejects

[1] § 175.57 "(a) Any alien * * * may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States."

"(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

his claim citizenship and refuses him entry. France, as noted, twice has denied him. The State Department has been negotiating for many months with Hungary for his readmission, but Hungarian sources remain mute. Even were Hungary to admit Mezei, there is considerable question whether he may properly be deported there. Mezei himself has sought entry to at least
41 a dozen countries, but without success. The man apparently has no place to go. Is the government justified in keeping him at Ellis Island; perhaps indefinitely?

Mezei does not contest the government's right to exclude an alien without a hearing where a finding is made that a public hearing would lead to disclosure of confidential information prejudicial to the best interests of the United States. He contends, however, that disclosure of the reasons for his exclusion would not be prejudicial and his present detention without a hearing is illegal. The exclusionary power of the Attorney General was settled by the Supreme Court in *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950) where it was held beyond the province of any court, absent express authority in law, to review the determination of the political branch of the government to exclude an alien. This was applied particularly to the case of an alien excluded without a hearing because the Attorney General deemed the disclosure of information on which he based his opinion dangerous to public security. The rule is clearly a harsh one. It is predicated upon the belief that exclusion is purely a political act, performed by the executive or upon his delegated authority. The court has no function in our system of separated powers to challenge such an act. Mezei, understandably, would wish to have the facts of his exclusion brought out in open hearing. Under the *Knauff* decision this court has no power to award such a hearing. That is a discretionary power of the Attorney General.

The District Court has the power to release an alien from custody who has been detained an unreasonably long time where his deportation cannot be effectuated. *U. S. ex rel. Chu*
42 *Leung* v. *Shaughnessy*, D. C. S. D. N. Y. 1950, 88 F. Supp. 91; *In re Krajcirovic*, D. C. Mass. 1949, 87 F. Supp 379; *Staniszewski* v. *Watkins*, D. C. S. D. N. Y. 1948, 80 F. Supp. 132; *U. S. ex rel. Janavaris* v. *Nicolls*, D. C. Mass. 1942, 47 F. Supp. 201. The government grudgingly admits that this may stand as an abstract principle of law but denies its relevance here on two grounds. (1) That Mezei is a security risk properly excluded from the United States and that no authority exists in law for releasing him merely because he has been detained a prolonged period while attempts were made to deport him. (2) That Mezei is not really being detained because he has always been free to

leave the country when he wanted. This, in view of the clear documentary evidence that Mezei cannot gain admission anywhere, hardly jibes with the usual cold realism of immigration policies. The government states flatly that an alien applying for admission to the United States (and this includes one who has already arrived on our shores) has no Constitutional rights. I do not agree. The Constitution applies even to aliens on Ellis Island. "Wherever the Constitution of the United States is applicable, and that includes ports of entry, an alien as well as a citizen is guaranteed that he will not be deprived of his liberty without due process." *In re Krajcirovic, supra.*

What constitutes an unreasonable detention is a perplexing matter. Section 154, Title 8 U. S. C. provides that

"All aliens brought back to this country in violation of law shall be immediately sent back * * * to the country whence they respectively came * * * unless in the opinion of the Attorney General immediate deportation is not practicable or proper."

43 The government insists that there can be no unreasonable detention in the case of an alien held for security reasons. To secure the argument, it is necessary to hurdle several cases in which an alien, detained for an unreasonable period, has been released. In U. S. ex rel. Janavaris v. Nicolls, supra, Judge Wyzanski said (p. 202):

"A more important question remains: Whether under the statute giving the district courts power to issue writs of habeas corpus this court has the power to release from custody an alien who has been detained an unreasonably long period of time by the Department of Justice after it has become apparent that although a warrant for his deportation has been issued, the warrant cannot be effectuated. That this Court has such power is hardly open to question * * * The theory on which the court is given the power to act is that the warrant of deportation, not having been able to be executed, is functus officio and the alien is being held without any authority of law. The issue, therefore, simmers down to this: Has the Department of Justice kept the alien such an unreasonably long period of time that the warrant has lost its efficacy?"

Judge Wyzanski found five months detention excessive.

In In re Krajcirovic, supra, Judge Wyzanski bolstered his decision in In re Janavaris. In that case he held a detention period of nine months unreasonable. The alien had been ordered excluded. It was likely that only Czechoslovakia, which he had fled, would take him. There, he was a political refugee, sentenced

in absentia to death. The language of the case is pertinent here.

44 "The District Director contends Krajcirovic is not confined because the Department of Justice has given him the option to depart voluntarily to any place outside the United States * * * In my opinion the contention rests on an unsound factual basis."

In the case at bar, no country has yet indicated a willingness to accept Mezei.

Judge Leibell, in this district, has held a seven months detention period unreasonable. Staniszewski v. Watkins, supra. No country would take Staniszewski. He was born in Poland but Poland rejected him. Judge Leibell said:

"What is to be done with petitioner? The government has had him in custody about seven months and practically admits it has no place to send him out of the country * * * I am most concerned with the seemingly helpless status of the petitioner and the failure of the proper officials to find a means of releasing petitioner from confinement at Ellis Island."

All of these cases should be limited to their facts, the government asserts. They do not involve an alien who has been adjudged a security risk. According to the government, the security element justifies an infinitely longer detention. There is some logic in this. An alien, who in a given case might be proved an enemy spy, should not be entitled to roam free after a short detention period, if the government is unable to effect his deportation. More aptly, in a case of that nature, the period of reasonable detention would be longer. A reasonable time is not a fixed, immutable period. It varies with the circumstances of each case. U. S. ex rel.

45 Consola v. Karmuth, D. C. W. D. N. Y. 1945, 63 F. Supp. 727; Moraitis v. Delaney, D. C. Md., 1942, 46 F. Supp. 425, modified other grounds, 4 Cir. 1943, 136 F. 2d 129.

There is no doubt that the security charge adds an element of great seriousness. Judge Ryan has recently decided a similar case in this district U. S. ex rel. Bojarchuk v. Shaughnessy (decided October 31, 1951). Bojarchuk was detained for 13 months at Ellis Island after being excluded as a security risk. The court denied his application for habeas corpus. The government relies heavily on the general similarity of that case as binding precedent in this. It is important to note Judge Ryan's exact words:

"That relator has long been retained cannot be questioned; that this is of his own making appears clear. Unsuccessful efforts to deport him to Poland where he was born, were made by the Government. *Relator has always been and now is free to leave this*

country for any country he desires. He has not chosen to do so; he may not by his own inaction and attempt at unlawful entry gain admittance into this country, especially after a finding that his entry is deemed inimical for security reasons." [Emphasis added.]

The government points to Judge Ryan's statement that the relator is free to leave the country. He cannot stay here simply by his own inaction. The government observes that Mezei had no trouble in leaving the country in 1948 "when it served his purpose," and tells this court, "He found no difficulty whatever in procuring Hungarian documents and travelling to Hungary in 1948; yet he now pretends that he cannot depart from the United States and expects the administrative authorities
46 and this court to give consideration to such specious contention." I find Mezei's contention far from specious. The world has changed a great deal since 1948. The government admits that it has been negotiating with Hungary for about ten months. There has been no observable progress. Mezei has produced documents before the court to show that at least 15 countries have refused him admission. If this is inaction, I should appreciate a government definition of action.

Mezei's case may further be distinguished from Bojarchuk by the difference in detention period. Bojarchuk was held 13 months. Mezei has now been held 21 months. The variance is great. The government must be prepared to show a grave security risk to justify the detention time.

We have come full circle again to the basic question—what is an unreasonable detention. I have said that the circumstances of each case determine the reasonableness or unreasonableness. The government sounds a grim warning that releasing this alien from detention will bring a flood of enemy agents, spies, saboteurs, madmen, homicidal maniacs, and lepers down upon us. I agree that in the proper case reasons may exist to detain an alien for a prolonged period. A grave security risk of the character envisioned by the government surely maybe one of these.

I also recognize that periods ranging from five months to nine months have been held unreasonable in the past and that when a court says the detention of a security risk for thirteen months is not unreasonable, that is far from saying that twenty-one months is reasonable. I think a burden has been placed on the government. In my mind the detention of an alien for 21 months pending deportation, is, absent other considerations, completely unreasonable. The burden now shifts to the government to
47 prove to this Court that Mezei's release, pending effectuation of the deportation order, would endanger public safety. If the information on which such a decision must be based is of such a confidential nature that its disclosure would be

serious breach of security, the offer of proof will be heard in camera.

The government will have a period of time hereinafter fixed to bring before the Court evidence, in accordance with this opinion, which would justify Mezei's detention for a further period. If deportation should be effectuated during the period, that will dispose of the case. I am aware that Mezei argues that the government can only deport him to the country from where he came (Title 8 U. S. C., Section 154); which according to judicial interpretation means France and England and/or Hungary. Mezei has shown his willingness to go elsewhere if the government can so arrange. If he does not consent, that would, of course, be reasonable grounds for a further detention.

If the government has not satisfied this Court as to the disposal of Mezei's case or his continued detention by December 10, 1951, he will be released upon conditions that the Court will set at that time on application.

Settle order.

Dated New York, N. Y., November 9, 1951.

IRVING R. KAUFMAN,
U. S. D. J.

48 In United States District Court

Intermediate order

November 29, 1951

The writ of habeas corpus in the above entitled proceeding having come on to be heard before this court on the 30th day of October, 1951, and after hearing Jack Wasserman, attorney for the relator, in support of the writ, and Myles J. Lane, United States Attorney for the Southern District of New York (William S. Sexton, Assistant United States Attorney, of counsel) in opposition thereto, and upon the petition for the writ exhibits in support of the writ and the return thereto and all the papers and proceedings had herein, It is

Ordered that unless the respondent Edward J. Shaughnessy effectuates the deportation of the relator Ignatz Mezei on or before December 10, 1951, or satisfies this court before that date that the release of the relator would endanger the public safety, the continued detention of the relator Ignatz Mezei on and after December 10, 1951, is hereby declared to be illegal, and, It is

Further ordered that if the respondent, Edward J. Shaughnessy so elects, an offer of proof as to whether or not the release of relator Ignatz Mezei would endanger public safety, will be heard in camera, and It is

49 Further ordered that upon the failure of the respondent, Edward J. Shaughnessy, to effectuate the deportation of the relator Ignatz Mezei, or to satisfy the court that his release would endanger public safety, or to release the said Ignatz Mezei on or before December 10, 1951, the said Ignatz Mezei shall, on application to this court, be released upon such conditions as the court will then determine.

Dated New York, New York, November 29, 1951.

IRVING R. KAUFMAN,
U. S. D. J.

CERTIFICATE OF SERVICE (omitted in printing)

50 December 14, 1951

In United States District Court

Final order

A Writ of Habeas Corpus in the above-entitled proceeding, having come on to be heard before this Court on the 30th day of October 1951, and after hearing Jack Wasserman, Attorney for the relator, in support of the writ, and Myles J. Lane, United States Attorney for the Southern District of New York (William J. Sexton, Assistant United States Attorney, of Counsel), in opposition thereto, and upon the petition for the writ, the return thereto, and all papers and proceedings heretofore had herein and the Court having rendered an opinion dated November 9, 1951, and it appearing that the respondent has not released the relator nor executed the outstanding order of exclusion and it further appearing that the respondent has declined to disclose to this Court in Camera the nature of the evidence and information upon which respondent relies in maintaining that the detention of relator for a period of approximately 21 months pending exclusion is not unreasonable, it is

Ordered that the writ of habeas corpus herein be and the same hereby is sustained, and it is further

Ordered that the relator be discharged on Parole from the custody of the respondent if he executes a parole agreement, the conditions of which shall be:

51 (1) That the relator will personally report to the respondent once each week at a time and place to be fixed by the respondent,

(2) That the relator will keep the respondent advised at all times of his residence address,

(3) That the relator will not depart from the jurisdiction of this Court and from the Southern District of New York,

(4) That the relator will surrender to the respondent upon demand if execution of the exclusion order has been arranged,

(5) That the relator will report on demand to the respondent and submit to any questioning concerning his activities and associations, and

(6) That the respondent may take the relator into custody if he violates any of the conditions of his parole or if he commits or is believed about to commit any act, which, in the opinion of the respondent, may endanger the internal security of the United States, and it is further

Ordered that before discharge he shall post with the respondent a parole delivery bond in a sum not to exceed Five Thousand ($5,000) Dollars, if such bond is required by the Attorney General; and it is further

Ordered that the execution of this order be stayed until December 18, 1951, to permit the respondent herein to file a notice of appeal and if such notice of appeal is timely filed, it is further

52 Ordered that a stay of the execution of this order be and the same hereby is granted pending the final disposition of the said appeal.

Dated: New York, New York, December 14, 1951.

IRVING R. KAUFMAN,
U. S. D. J.

53 In United States District Court

Notice of appeal

December 17, 1951

SIR: Notice is hereby given that the respondent hereby appeals to the United States Court of Appeals for the Second Circuit, from that portion of the order entered in this proceeding on December 14, 1951, which sustains the writ of habeas corpus herein, and directs the relator's discharge on parole.

Dated: New York, N. Y., December 17, 1951.

Yours, etc.,

MYLES J. LANE,
United States Attorney for the Southern District of New York, Attorney for Respondent. Office and P. O. Address, United States Courthouse, Foley Square, New York 7, New York.

TO GEORGE MOERMAN, ESQ., AND JACK WASSERMAN, ESQ.,
305 Broadway, New York, N. Y.

54 In United States District Court

Notice of cross appeal

December 21, 1951

[Title omitted.]

Sir: Notice is hereby given that the relator hereby cross-appeals to the United States Court of Appeals from that portion of the order entered herein on December 15, 1951, which imposes conditions upon the relator's release and the posting of a bond of $5,000 and from the court's affirmance of the right of respondent to deny relator an exclusion hearing.

55 Dated Washington, D. C., December 21, 1951.

Yours, etc.

JACK WASSERMAN,
Warner Building, Washington, D. C.,
Attorney for Relator.

GEORGE MORRMAN,
346 Broadway, New York,
Of Counsel.

To MYLES J. LANE,
United States Attorney for the Southern District of New York, Attorney for Respondent, Foley Square, New York 7.

CERTIFICATE OF SERVICE (omitted in printing)

56 *Stipulation as to record* (omitted in printing)

57 [Clerk's Certificate to foregoing transcript omitted in printing.]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 189—October Term, 1951.

(Argued February 8, 1952 Decided March 20, 1952.)

Docket No. 22263

UNITED STATES OF AMERICA *ex rel.* IGNATZ MEZEI, *Relator*,

—v.—

EDWARD J. SHAUGHNESSY, District Director, Immigration and Naturalization Service, Ellis Island, New York, *Respondent*.

Before:

SWAN, *Chief Judge*, and L. HAND and CLARK, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York.

Petition for a writ of habeas corpus by Ignatz Mezei, an alien detained at Ellis Island, to which Edward J. Shaughnessy, District Director, Immigration and Naturalization Service, Ellis Island, New York, made return. The District Court rendered a decision, D. C. S. D. N. Y., 101 F. Supp. 66, indicating a conditional intention to sustain the writ, and thereafter in due course entered an order sustaining the writ and directing the petitioner-relator's discharge on parole under certain specified restrictions; and both parties appeal. Affirmed on respondent's appeal; reversed and remanded on relator's appeal.

JACK WASSERMAN, Washington, D. C. (George Moerman, New York City, on the brief), *for relator*.

WILLIAM J. SEXTON, Asst. U. S. Atty., New York City (Myles J. Lane, U. S. Atty., New York City, Louis Steinberg, Dist. Counsel, and Max Blau and Lester Friedman, Attys., U. S. Department of Justice, Immigration and Naturalization Service, on the brief), *for respondent*.

CLARK, *Circuit Judge:*

The District Director of the Immigration and Naturalization Service for the New York District appeals from a final order of the District Court sustaining a writ of habeas corpus and directing the conditional release of the relator after twenty-one months' custody on Ellis Island. The order was entered after respondent had declined to produce certain information called for by the judge in a preliminary decision, D. C. S. D. N. Y., 101 F. Supp. 66. From the facts it appears that Mezei, the relator, was born on Gibraltar in 1897 and thus is a native of Great Britain. He was admitted to the United States on December 23, 1923, for permanent residence and has lived for the past twenty-five odd years in Buffalo, New York, where he owns his own house. He is married to a native-born American and his children were also born in this country. It is pointed out in his behalf that during World War II he sold United States War Bonds, donated blood to the Red Cross, and acted as a civilian defense air-raid warden.

But in 1948 Mezei left the United States, apparently to see his dying mother in Europe, and, though refused permission to enter Roumania where she resided, remained for some months in Hungary because of "difficulty in securing an exit permit." Finally, on February 2, 1950, he sailed from Le Havre on the Ile de France for return to the United States, armed with an American quota visa issued by our Budapest Consulate December 1, 1949. On his arrival in New York, February 5, however, he was temporarily excluded by the immigration authorities from admission pursuant to 8 CFR 175.57. On May 10, the Attorney General ordered the exclusion made permanent and denied relator's request for a hearing before a Board of Special Inquiry pursuant to the same regulation authorizing a denial of such a hearing when the disclosure of confidential information would be "prejudicial to the public interest."

Thereafter two attempts were made to deport him to France, "the country whence [he] came." 8 U. S. C. A. § 154. Both times upon relator's arrival on their shores the French authorities denied him admission. Since then he has made continued efforts to effect entry elsewhere, applying to some twelve other nations. The State Department has negotiated unsuccessfully for his return to Hungary. None will have him. As the matter comes to us, then, relator is stateless and, until he succeeds in gaining admission to some foreign country, all of which have thus far been unanimous in their inhospitality, he will remain in confinement on Ellis Island. Hence this writ.

Why his presence here is "prejudicial to the interests of the United States" is an undisclosed secret known only to the Attor-

ney General's staff. For his part, relator has alleged the only basis for such a determination of which he is aware to be a previous membership in the International Workers' Order, which he joined for the purpose of securing life insurance. (We note in passing that the Supreme Court has voided the inclusion of this organization on the Attorney General's list of subversive organizations without a hearing. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.) Respondent, in the court below, refused to disclose the actual reasons when the District Judge directed that the writ be sustained unless he indicate them *in camera*. D. C. S. D. N. Y., 101 F. Supp. 66, 70. The final order was entered in the context of this refusal. Thus this appeal brings before us the question of whether or not indefinite detention on Ellis Island is to be permitted on the basis of the Attorney General's unreviewable permanent order of exclusion. We do not think it is.

It is true, as a divided Supreme Court has recently reiterated, that "an alien who seeks admission to this country may not do so under any claim of right." *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 542. Nor need the determination of who is to be turned back be made on the basis of a hearing or the disclosure of the reasons why admission is to be denied. *Ibid.* To this end, then, a confinement without hearing is justified as in the exercise of the sovereign prerogative to exclude any and all aliens who seek entry into the United States.

But the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty. See *Walker* v. *Chief Quarantine Officer*, D. C. Canal Zone, 69 F. Supp. 980. And unless accompanied by those indicia of legal procedure that are embedded in the constitution as the right of all men—including an objective standard of prohibited action, the right to counsel and to confront accusers, and a speedy trial—such confinement must violate the Fifth Amendment.

Respondent, relying heavily on the majority *Knauff* opinion, contends that constitutional protection is never available to an excluded alien. The irrelevance of the Fifth Amendment to the procedure there challenged, however, was based not on the fact that Mrs. Knauff was an alien denied admission, but rather on the theory that an order of deportation is not punishment for a crime and so one denied entry is not deprived of either life, liberty, or property. This is a distinction long recognized in the cases. See, *e.g.*, *Fong Yue Ting* v. *United States*, 149 U. S. 698, 723-724, 730. But where, as here, confinement is no longer justifiable as a means

to effectuate removal elsewhere, then liberty as such is at stake and the mandate of due process of law may be invoked by all, "whether citizens, aliens, alien enemies or enemy belligerents." Rutledge, *J.*, dissenting in *In re Yamashita*, 327 U. S. 1, 41, 42. The Fifth Amendment provides without qualification that no person shall "be deprived of life, liberty, or property, without due process of law." It is not confined to the protection of citizens; and its provisions, by definition, "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. They extend in fact to all whose presence here brings them within reach of the judicial and administrative processes of the United States Government. *United States* v. *Pink*, 315 U. S. 203, 228.

Thus the courts have held in the past that even a pending deportation does not make unavailable to aliens the privilege against self-incrimination, *Schoeps* v. *Carmichael*, 9 Cir., 177 F. 2d 391, 400, certiorari denied 339 U. S. 914; the right to reasonable bail, *U. S. ex rel. Pirinsky* v. *Shaughnessy*, 2 Cir., 177 F. 2d 708; or the protection against cruel and unusual punishments, *Wong Wing* v. *United States*, 163 U. S. 228. Nor while residing here are they prohibited from appealing to the guaranties of freedom of speech, *Bridges* v. *Wixon*, 326 U. S. 135, or against unreasonable searches and seizures, *Unitd States* v. *Wong Quong Wong*, D. C. Vt., 94 F. 832. We think it must follow that detention of a person in possession of a valid visa enabling him to reach our shores is justified only as a means necessary to carry out his lawful removal from the country. *Wong Wing* v. *United States*, *supra*, 163 U. S. at page 235. Hence where it no longer subserves this end and becomes instead nothing less than a device for imprisonment for past or suspected misdeeds without due process of law, it must violate the mandates of the Fifth Amendment. See *Ex parte Eguchi*, D. C. S. D. Cal., 58 F. 2d 417.

Nor has Congress spoken to the contrary. The assumed executive power to confine non-resident aliens seeking entry is not specifically granted; rather it is inferred from 8 U. S. C. A. § 137—4, providing for "temporary exclusion" of any alien who appears to the examining immigration authority to be subversive under 8 U. S. C. A. § 137. We are unable from this to infer a congressional conception of incarceration any broader than the exclusion process it was designed to effectuate. This would seem re-emphasized by the provisions of 8 U. S. C. A. § 156(a, b) made specifically applicable to deportation proceedings. By these it is provided that where the Attorney General is unable to effect the removal elsewhere of undesirable aliens within the continental United States,

he cannot keep them confined beyond a period of six months, but must enlarge them, though under provisions for their supervision if he finds that necessary. Detention in warrant deportation cases is thus specifically limited in time. We think this indicates a legislative policy in line with constitutional mandates. That no explicit provision is applicable in exclusion proceedings against aliens not already admitted does not, we think, signify another policy as to such persons. Rather it reflects the normal situation that an alien excluded from our shores is not here to be indefinitely confined; it is simply not geared to the case, developed by necessity and legal theory, where an alien is constructively not here, although actually with us in physical presence for an indefinite stay. So judicial power to release an alien from a general "unreasonable detention" has been widely accepted by the district courts. See *U. S. ex rel. Chu Leung* v. *Shaughnessy*, D. C. S. D. N. Y., 88 F. Supp. 91, affirmed 2 Cir., 176 F. 2d 249; *In re Krajcirovic*, D. C. Mass., 87 F. Supp. 379; *Staniszewski* v. *Watkins*, D. C. S. D. N. Y., 80 F. Supp. 132; *U. S. ex rel. Janavaris* v. *Nicolls*, D. C. Mass., 47 F. Supp. 201.

This power, however, has never before been exercised in favor of a "security" risk, and respondent urges this element on us as a ground for distinction. If the distinction exists it is not to be found in the statute. Congress has spoken here only to give the Attorney General the general power to make an exclusion order permanent; no broader sanctions against subversive aliens are provided for than for those who are excluded because of mental disability or disease. *U. S. ex rel. Schwarzhopf* v. *Uhl*, 2 Cir., 137 F. 2d 898, 900, therefore, recognizing the validity of more extensive statutory detention of allegedly dangerous foreigners in time of war without trial, is on this ground inapposite.

But respondent carries his vigorous objection further, asserting on grounds of public safety that this precedent will require the release of a host of persons dedicated to conspiring against the United States or actively participating with foreign governments or their nationals in continuing designs against us. Since counsel, as representing not only the respondent, but also the Attorney General, have declined to give the court, even *in camera*, specific grounds for their violent fears as to this individual, we can only draw conclusions from such general factors as are obvious to all. Thus we know that the federal investigative agencies continue in operation; the criminal statutes forbidding espionage, sabotage, and broader types of dangerous activity remain in force; and the speedy indictment and trial of actual crime in the courts still obtain. So, relying on our normal powers of observation, we cannot share the well-night fantastic belief that this individual, identified,

isolated, and under the strict surveillance to which he is and will now be subjected, constitutes so vital a menace to the peace and safety of this powerful nation that henceforth he must be held in strict confinement. On the other hand, there is no doubt of the meaning of the course we are asked to validate. However much it be clothed in legal semantics it is that a settled twenty-five-year resident of this country be now held in indefinite imprisonment without trial and on the uncontrolled direction of the policing arm of the executive. Even in a criminal case and after conviction had, Mr. Justice Jackson has said in words of eloquent admonishment: "Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted." *Williamson* v. *United States*, 2 Cir., 184 F. 2d 280, 282. But the plight of this relator is actually much worse than if the charge against him had been formulated as one for indictment and criminal prosecution; for then he would have had the ordinary safeguards of judge and jury and face at least a definite punishment.

It must be noted, too, that in the absence of any indication of overt acts of subversiveness upon the part of the relator, we come dangerously close to imprisonment for mere beliefs or propaganda. If in fact our country needs so drastic a restraint as this, violative of all our concepts of due process, against this individual thus situated, then it would indeed seem admitted, as a former distinguished Attorney General has pointed out, that "our institutions do not have the sturdiness which our words to the rest of the world announce, and will falter under the greater impact of the alien dogma." Biddle, The Fear of Freedom 10, 1951. "Nothing that the agents of communism have done or can do in this country is so dangerous to the United States as what they have induced us * * * to do to ourselves." Barth, The Loyalty of Free Men, 1951, quoted by Professor Z. Chafee, Foreword, x.

The most recent decision of the Supreme Court, *Carlson* v. *Landon*, March 10, 1952, —— U. S. ——, —— S. Ct. ——, which upholds the Attorney General's discretionary power to deny bail pending determination of deportability, as we read it, does not controvert our view, but, we believe, lends a measure of support to it. The Court's interpretation of § 23 of the Internal Security Act of 1950, 8 U. S. C. A. § 156(a), is expressly traced to the opinions of this court in *U. S. ex rel. Zapp* v. *District Director of Immigration & Naturalization*, 2 Cir., 120 F. 2d 762; *U. S. ex rel. Potash* v. *District Director of Immigration & Naturalization*, 2 Cir., 169 F. 2d 747; *U. S. ex rel. Doyle* v. *District Director of Immigra-*

tion & Naturalization, 2 Cir., 169 F. 2d 753; and *U. S. ex rel. Pirinsky* v. *Shaughnessy*, *supra*, and supports the approach of this court in our prevailing and dissenting opinions in *U. S. ex rel. Young* v. *Shaughnessy*, 2 Cir., Feb. 13, 1952. Certainly, of itself, it does not broaden the right of restraint beyond all need of what it is designed to effectuate, but specifies that "Detention is necessarily a part of this deportation procedure." The opinion is in fact quite carefully limited to the case in hand, perhaps because of the vigorous dissents on the part of four of the justices. So it states "that the problem of habeas corpus after unusual delay in deportation hearings is not involved in this case." *A fortiori*, it would seem, this postpones for the future final adjudication of the effect of unusual delay in carrying out of the administrative writ after the proceedings as to deportability have reached their conclusion.

The relator has also appealed from the District Court's enlargement order. He contends that the condition of a $5,000 performance bond and the limitation on his travel to the Southern District of New York are in conflict with an alleged right to complete release and further are unreasonable. As to the first, there can be no doubt that bond and movement limitations may be set under the general authority to impose conditions "upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend." *Zakonaite* v. *Wolf*, 226 U. S. 272, 275. *Ex parte Lee Fong Fook*, D. C. N. D. Cal., 74 F. Supp. 68, reversed on other grounds *Lee Fong Fook* v. *Wixon*, 9 Cir., 170 F. 2d 245, certiorari denied 336 U. S. 914; *Anthony* v. *Hunter*, D. C. Kan., 71 F. Supp. 823; and *U. S. ex rel. Chong Mon* v. *Day*, D. C. S. D. N. Y., 36 F. 2d 278, are instances where the courts have set conditions of this nature on the issuance of a writ of habeas corpus.

But serious doubt may be entertained as to the reasonableness of all of the conditions here set. Their function is essentially to secure the reappearance of relator, should deportation subsequently become possible. See *Stack* v. *Boyle*, 342 U. S. 1, 4-5. Thus the $5,000 bond may be, as alleged, unduly high; petitioner asserts his inability to satisfy it and there is no evidence that he is presently at large. Such a bond should not be of such an amount as substantially to defeat the relator's right to enlargement. And the restriction of his movements to the Southern District of New York seems especially severe in view of the fact that his wife, family, and home are located in Buffalo. Relator's final objection to the absence of a hearing prior to the order of deportation, however, is without substance in view of the holding in *U. S. ex rel. Knauff* v. *Shaughnessy*, *supra*.

We therefore affirm on respondent's appeal and reverse and remand on relator's appeal for a hearing before the District Judge on the sole question of the reasonableness of these conditions set on relator's enlargement.

L. HAND, *Circuit Judge* (dissenting):

I believe that my brothers agree that Mezei, although he had been long lawfully resident in the United States, was not entitled, when he left in 1948, to reenter as an alien who had "temporarily departed"*; and that he was in precisely the same position as though this had been his first visit. *United States ex rel. Polymeris* v. *Trudell*, 284 U. S. 279. I assume that we also agree that his presence at Ellis Island did not change his legal situation from what it had been when the inspector excluded him on the ship; he had not "entered" the United States and the order before us is one of "exclusion" and not of "deportation." *Kaplan* v. *Tod*, 267 U. S. 228 (incidentally that was a far harsher case than this). So much taken for granted, the only question is whether an alien, who comes to this country and is lawfully excluded, may secure a qualified admission because there is no country which will accept him, for I shall take it that that is true of Mezei.

I do not believe that an alien so situated can force us to admit him at all. Suppose, as I have just suggested, that the respondent had refused to let him leave the ship. I do not see what legal process Mezei could have invoked to get ashore before she left; nor do I see what theory supports the claim that, because we did not impose upon him this harsher alternative, but, *ex gratia*, allowed him to land until his case was decided, we must grant him even a limited version of that entry which the statute denies him. For we must remember that the order does give him a privilege of entry which will endure as long as no other country will receive him. Moreover, although that privilege is hedged about in various ways, he will be able nevertheless to mingle with the mass of citizens, and spread among them what I suppose we are to consider as the contagion of his baleful presence. Think what one may of a statute based upon such fears, when passed by a society which professes to put its faith in the free interchange of ideas, a court has no warrant for refusing to enforce it. If that society chooses to flinch when its principles are put to the test, courts are not set up to give it derring-do.

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* § 213(b) Title 8 U. S. C.

No constitutional question can arise. An alien, who comes to our shores and the ship which bears him, take the chance that he may not be allowed to land. If that chance turns against them, both know, or, if they do not, they are charged with knowledge, that, since the alien cannot land, he must find an asylum elsewhere; or, like the Flying Dutchman, forever sail the seas. When at his urgence we do let him go ashore—*pendente lite* so to say—we may give him whatever harborage we choose, until he finds shelter elsewhere if he can. Had Mezei never resided here, I wonder whether this would have been doubted, and, as I have said, we are forced to treat him as though he never had been a resident.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES EX REL. MEZEI

v.

EDWARD J. SHAUGHNESSY, ETC.
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JUDGMENT

United States Court of Appeals
Second Circuit
Filed Mar 20 1952
Alexander M. Bell, Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of March one thousand nine hundred and fifty-two Present:

HON. THOMAS W. SWAN,
Chief Judge,

HON. LEARNED HAND,
HON. CHARLES E. CLARK,
Circuit Judges.

UNITED STATES EX REL. IGNATZ MEZEI,
Relator-Appellant,

v.

EDWARD J. SHAUGHNESSY, District Director, etc., *Respondent-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal by the respondent from the order of said District Court be and it hereby is affirmed; and the appeal by the relator be and it hereby is reversed and cause remanded for a hearing before the District Judge on the sole question of the reasonableness of the conditions set on relator's enlargement in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk.*

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, ALEXANDER M. BELL, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 71, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

UNITED STATES OF AMERICA EX REL. IGNATZ MEZEI,
Relator-Appellant,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization, etc., *Respondent-Appellant,*

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 2nd day of June in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the said United States the one hundred and seventy-sixth.

SEAL

/s/ ALEXANDER M. BELL
Clerk.

U. S. GOVERNMENT PRINTING OFFICE 1952—209510/P O 1297

71 Supreme Court of the United States

No. 139, October Term, 1952

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

Order allowing certiorari

Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1952

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No. 139

In the Supreme Court of the United States

OCTOBER TERM, 1952

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 139

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, which directed that respondent, an alien whose application for admission to the United States had been rejected by the Attorney General, be released from detention and permitted to enter the United States on bond.

OPINION BELOW

The opinions in the Court of Appeals (R. 60-67) have not yet been reported. The opinion of the District Court (R. 38-47) is reported at 101 F. Supp. 66.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1952 (R. 68-69). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien properly excluded from admission to the United States may be released from detention and permitted to reside in the United States under bond for an indefinite period solely because the United States has been unable to effectuate his departure.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 16-19.

STATEMENT

In October, 1951, respondent, an alien confined at Ellis Island, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, seeking his release from detention on the ground that he had been confined since December, 1950, and there was no place to which he could be deported (R. 4-9).

From the petition, return, and opinion of the District Court, the following facts appear:

Respondent is an alien of uncertain antecedents whose parents were Hungarian or Roumanian (R. 39) but who claims to have been born in Gibraltar (R. 4). He resided in the United States from 1923

to 1948 (R. 4, 39).[1] In 1948 he left the United States, allegedly to visit his dying mother in Roumania, but never reached that country, because he was denied permission to enter (R. 4). He remained in Hungary for 19 months (R. 4-5).

Early in 1950, respondent left Hungary, after obtaining an immigration visa for entry into the United States as an immigrant (R. 5).[2] However, upon his arrival at New York, February 9, 1950, he was ordered temporarily excluded by an immigrant inspector pursuant to 8 C.F.R. 175.57 (R. 5, 10). After reviewing the evidence, the Attorney General on May 10, 1950 ordered that the temporary exclusion be made permanent without a hearing before a Board of Special Inquiry on the basis of evidence of a confidential nature, the disclosure of which would be prejudicial to the public interest (R. 5, 10). That determination was based on a finding that respondent's entry would be preju-

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[1] In his petition, respondent stated that he had been admitted for permanent residence (R. 4), but the District Court noted that the Government alleged that he had never been admitted for permanent residence (R. 39). At a hearing on the conditions of bail on remand of the cause pursuant to the mandate of the Court of Appeals, respondent admitted that he had not legally entered the United States.

[2] Respondent alleged that he is married to an American citizen (R. 4), but did not state, what the Immigration Service files show, that the marriage was entered into in Hungary in 1949, when he sought to return to the United States. Thus, it appears that the only relationship in the United States was a meretricious one. Moreover the court below is in error in stating that respondent has American children. On the hearing on the remand, he admitted that he has none. According to the Immigration Service files, respondent's wife has four children by a previous marriage, the youngest of which is 36 years old.

dicial to the public interest for security reasons (R. 11).

Efforts to execute the order of exclusion have thus far been unsuccessful. France has twice turned respondent back from its borders, taking the position that he had merely embarked there and refusing to accept him unless there was some assurance that he would be received in another country (R. 6, 18). On one of the trips to France, an effort was made to land respondent in the United Kingdom, but the British authorities likewise refused to take him, presumably because he did not appear to be a British citizen (R. 19, 21). The Immigration and Naturalization Service has sought to obtain travel documents on respondent's behalf from Hungary, but thus far the Hungarian government has not announced any decision on such application (R. 14). Respondent also has applied unsuccessfully for entry into 12 Latin American countries (R. 23-34), but alleges no effort on his own part to secure permission to enter Roumania or Hungary. After one of respondent's petitions for habeas corpus had been denied, in June, 1951, respondent told an officer of the Immigration Service that he intended to make no further effort to depart from the United States (R. 13).

In the meantime respondent has importuned the courts for his release. Three writs of habeas corpus were dismissed and a petition for a fourth writ was denied by the United States District Court for the Southern District of New York (R.

7-8). However, on October 22, 1951, a fifth habeas corpus proceeding was commenced and a writ was issued (R. 2-3).

After hearing, Judge Irving R. Kaufman held, on November 9, 1951, that the detention of Mezei apparently had been excessively prolonged and that he would sustain the writ of habeas corpus unless the Government permitted the court to examine the evidence against respondent *in camera* (R. 46-49). This the Government declined to do. On December 14, 1951, Judge Kaufman signed a final order sustaining the writ of habeas corpus and directing that Mezei be discharged on parole under certain conditions, including requirements that he report regularly and furnish a bond in the sum of $5,000 (R. 50-52).

On appeal, the United States Court of Appeals for the Second Circuit affirmed Judge Kaufman's order, holding that respondent was entitled to release because his detention had been excessively prolonged. It directed a reconsideration of the terms under which release was to be authorized. (R. 69.)[3] In his dissenting opinion Judge Learned Hand took the position that respondent, as an applicant for entry into the United States, could claim no constitutional rights and could not compel the United States to receive him, that his detention ashore instead of on the vessel was merely

[3] In conformity with the direction of the Court of Appeals, Judge Kaufman on May 2, 1952, issued a modified order which reduced the bail to the sum of $3,000 and permitted Mezei to travel and to reside in Buffalo, New York. Mezei has posted bail and has been released under the court's order.

a privilege granted him which conferred no status, and that the court had no authority to permit the entry of an alien whom the Attorney General had barred as potentially dangerous (R. 66-67).

REASONS FOR GRANTING THE WRIT

The decision below raises a very serious problem in the enforcement of the immigration laws, which has implications beyond the facts of this immediate case. The question is whether an alien properly excluded from the United States for any of the reasons specified by Congress must nevertheless be permitted physically to enter the United States and reside here for an indefinite period, whenever the United States is unable to effectuate his departure. Neither respondent nor the courts below question the propriety of respondent's exclusion;[4] the sole basis for his release is the fact that, in the period between his exclusion and the instant petition for habeas corpus, the United States has been unable to effectuate his departure.

Under this holding, therefore, any excludable alien who manages to get to our shores may nevertheless obtain most of the benefits of entry, if, for some reason, the country from which he comes re-

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[4] The well-established proposition, that an alien who voluntarily leaves the United States, even though resident here, is, upon his return, subject to the same rules of exclusion as on initial entry, has not been questioned in this case. See, *e.g.*, *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-548; *Hansen* v. *Haff*, 291 U.S. 559, 561-562; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *United States* v. *Corsi*, 287 U.S. 129, 132; *Lewis* v. *Frick*, 233 U.S. 291, 297; *United States ex rel. Kwong Hai Chew* v. *Colding, et al.*, 192 F. 2d 1009 (C.A. 2), pending on writ of certiorari, No. 17, this Term.

fuses to take him back and no other country is willing to take him. Since ordinarily the most undesirable groups would have the greatest difficulty in securing acceptance by some other country, the result of the decision below may well be to foist on the United States the very aliens whom it is most desirable to exclude. Moreover, the decision below provides a ready tool for espionage. A hostile power could be certain of getting an agent into the United States by the simple expedient of sending him here and refusing to take him back.[5] Hence, the decision below very seriously affects the processes established by Congress for safeguarding the national security and enforcing the immigration laws.

We submit that there is no authority for the extraordinary relief granted by the court below. As Judge Learned Hand points out in his dissent (R. 66), respondent's rights must be judged as if he were still on board ship. Section 15 of the Immigration Act of 1917, 8 U.S.C. 151, commands immigration officers to conduct examinations on board a vessel and authorizes them to

> order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve vessels, the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United

[5] Countries to which the alien had no prior relationship could not be expected to admit him.

> States from any of the obligations which, in case such aliens remain on board, would under the provisions of this Act bind the said vessels, transportation lines, masters, agents, owners, or consignees * * *

The transportation lines are relieved of the responsibility for safekeeping of such aliens only when they are temporarily detained in premises owned or controlled by the United States. Additionally, such transportation lines must "pay all expenses of such removal and all expenses arising during subsequent detention, pending decision on the aliens' eligibility to enter the United States and until they are either allowed to land or returned to the care of the line or to the vessel which brought them."

Thus the statutory scheme provides for detention ashore only as an equivalent and a substitute for detention aboard the vessel.

An alien excluded from entry into the United States has thus, in legal effect, never reached the United States. The fundamental error in the decision below is that it treats exclusion as in the same category as deportation of an alien actually present in the United States. Concededly, if a resident alien's detention under an order of deportation is protracted for an unreasonable length of time he may be permitted to return to his former status—sojourn in the United States. *United States ex rel. Janavaris* v. *Nicolls*, 47 F. Supp. 201 (D. Mass.). By the same reasoning, if there is unreasonable delay in executing an order of ex-

clusion, the alien likewise may insist on being permitted to return to his former status—residence or sojourn *outside* the United States. But he cannot insist on being awarded a privilege which is greater than his previous situation—the opportunity to enter the United States where such entry has been lawfully proscribed.

As this Court pointed out in *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542, 543, "an alien who seeks admission to this country may not do so under any claim or right. * * * it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." The courts have interceded in exclusion cases only to ascertain whether the order of exclusion was entered in conformity with law—on a ground specified by Congress and after a fair hearing, when Congress provided for such a hearing. *Gegiow* v. *Uhl*, 239 U.S. 3 (1915). There is no claim here that the procedures established by Congress have been violated; on the contrary the decision below does not question the propriety of the exclusion order. What the court is really doing is reviewing the method by which the political branch of the Government is executing its admitted power to keep out of the country a properly excluded alien. We submit that there is no warrant for such judicial intervention.

Congress has not extended to excluded aliens the right to release on bail. Pursuant to statutory authority, the executive branch of the Government

has determined that respondent's presence would be a menace to the safety of the country. We submit that in this field the courts have no power to overrule the determination of the legislative and executive branches of the Government. Respondent has no constitutional right to be admitted into the United States at all. He therefore has no constitutional right to be admitted even temporarily under bond. As Judge Galston said in denying bail in the case of *Kwong Hai Chew* v. *Colding*, 98 F. Supp. 717, 719, pending before this Court on writ of certiorari, No. 17, this Term, a case involving exclusion of an alien seaman who had previously been admitted for permanent residence:

> Granting of bail would, in effect, require the court to ignore the serious charges being pressed by the Government. Indeed a most illogical situation would arise if this court were to grant bail in this case, for it would mean that the relator, at least temporarily, would not be excluded from this country. In effect that would modify the order of the Attorney General, and this court has no power to do that. Where, as here, the executive branch of the government is authorized to exercise the power of exclusion of aliens for the best interests of the country during a time of national emergency, to ignore the determination of the executive, which determination is not subject to judicial review, would constitute an abuse of discretion.

Unquestionably, an unhappy situation is presented when an alien, properly barred from the

United States, cannot find another country to receive him. Nevertheless, since such alien has no right to enter the United States, it is not the duty of the United States to receive him merely because other countries do not extend to their citizens the rights which the United States accords to its own. It is not for the courts to admit into the United States, even under restrictions, aliens who Congress and the executive have determined should be excluded.

Certainly, the judgment of those authorized to exclude an alien should not, in any event, be set aside in a case in which it does not clearly appear that admission is the only alternative to a continuous limbo status at the door of the United States. Though the court below assumed that all efforts to effect respondent's admission to another country had been exhausted, that is not the case at all. The place to which respondent could most reasonably expect to return is Hungary, and the record is barren of any suggestion that he ever has applied to that country. Significantly, when he desired to enter Hungary in 1948 he experienced no difficulties in obtaining official approval for entry into that country. Even though the United States has received no answer to its request that Hungary admit respondent (R. 14), past experience emphasizes the likelihood that respondent might well be found acceptable by Hungary, Roumania or other Iron Curtain countries, if he made a bona fide application for admittance. See *United States* v. *Spector*, 343 U.S. 169. The twelve Latin American

countries alleged to have rejected him patently have been marshalled for dramatic effect rather than because of any sincere expectation that they would receive him. Any alien not wanted here could probably find 50 other countries which would *not* accept him. And, most significantly, respondent has declared that he would "make no further effort to depart from the United States and would do nothing except to attempt to remain in this country." (R. 13.)

Whether detention in a case of this sort has been so unreasonably prolonged as to justify admission is a question that must be answered in terms of the purpose of that detention. The majority opinion below observes (R. 61) that "the power to hold can never be broader than the power to remove *or shut out.*" (Emphasis added.) However, the court later ignores its own formulation in declaring that continued detention "is justified only as a means necessary to carry out his lawful removal from the country" (R. 62). The latter declaration overlooks the equally important purpose—to shut out aliens whose admission would be improper under the policies formulated by Congress and the executive. As the return in this case stated, "The relator is not being detained in the usual sense but is in custody solely to prevent him from gaining entry to the United States in violation of law. He is free to depart from the United States to any country of his own choice" (R. 13).

If respondent were now applying for admission, he could validly be excluded in the interests of

national security. His continued detention to prevent his entry is therefore justified in the interests of national security. So long as the finding that his entry would be prejudicial to the United States is outstanding, detention cannot be characterized as unreasonably prolonged regardless of how long it continues. See *Ludecke* v. *Watkins*, 335 U.S. 160; *Schwarzkopf* v. *Uhl*, 137 F. 2d 898 (C.A. 2); *Carlson* v. *Landon*, 342 U.S. 524. The mere fact that confinement has extended over a protracted period does not in itself warrant intervention by the courts. Thus an alien enemy interned during time of war hardly could make a tenable complaint that his confinement must be ended because it had extended over a period of months, or even years. *Id.* And a person barred from his home and usual occupation in a critical war zone likewise could not demand relief merely by invoking the calendar. *Korematsu* v. *United States*, 323 U.S. 214. It is only when confinement is prolonged beyond the needs defined by Congress that the detention of an excluded alien may become unreasonable. And in a security exclusion case, stemming from the mandate of Congress and the President, it cannot be unreasonable to continue detaining an excluded alien for the purpose of debarring him from the United States so long as his entry continues to be a menace to the safety of the United States.

The view of the district court (R. 46-47), for which the court below appears to have had some sympathy, was apparently that even when the original exclusion was properly ordered upon con-

fidential information which could not be revealed to the court, such information must nevertheless be made available to the court so that it could review the administrative determination to continue the alien's detention. However, the same considerations which preclude judicial review of the initial determination to exclude, (see *Knauff* v. *Shaughnessy*, 338 U.S. 537), preclude judicial review of the determination to continue exclusion. The court below seems to have assumed that because the confidential information could not be revealed, it was insubstantial, and it seems to have accepted respondent's self-serving statement that the primary ground for his detention was his membership in the International Workers Order (R. 5-6). Aside from the fact that respondent's petition can hardly be characterized as wholly candid (see *supra*, pp. 11-12), it is evident that the court was not justified in assuming arbitrary action by the executive. Nor was the court below warranted in assuming that admission would be proper because federal investigating agencies continue in operation. Congress has determined that investigative agencies should be spared the burden of being required to watch potentially dangerous aliens who have no right to be here at all. Congress has left it to the executive to determine who should be excluded in the interests of national security. The courts are neither authorized nor sufficiently informed, in the nature of things, to override that determination. As this Court said in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 111, in de-

scribing the need for preserving the confidential character of the information on which executive action in this field frequently must rest:

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. * * *

It is the province of Congress and the executive to determine whether an alien should be excluded. The court below had no authority indirectly to overrule that determination by admitting, even under restrictions, an alien properly found to be excludable.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1952.

Section 15 of the Immigration Act of 1917, 39 Stat. 885, as amended, 8 U.S.C. 151, provides:

That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or to send competent assistants to the vessel and there inspect all such aliens or said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve vessels, the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would under the provisions of this Act bind the said vessels, transportation lines, masters, agents, owners, or consignees: *Provided*, That where removal is made to premises owned or controlled by the United States, said vessels, transportation lines, masters, agents, owners, or consignees, and each of them, shall, so long as detention there lasts, be relieved of responsibility for the safekeeping of such aliens. Whenever a temporary removal of aliens is made the vessels or transportation lines which brought them and the masters, owners, agents, and consignees of the vessel upon which they arrive shall pay all expenses of such removal and all expenses arising during subsequent detention, pending decision on the aliens' eligibility to enter the United States and until they are either allowed

to land or returned to the care of the line or to the vessel which brought them, such expenses to include those of maintenance, medical treatment in hospital or elsewhere, burial in the event of death, and transfer to the vessel in the event of deportation, * * *.

Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U.S.C. 223), provides in pertinent part:

> When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful —
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; * * *

In executing the powers conferred by the Passport Act of 1918, as amended, the President promulgated Proclamation No. 2523 of November 14,

1941, 6 F. R. 5821, 55 Stat. (Part 2) 1696, as amended August 17, 1949, by Proclamation 2850, 14 F. R. 5173, which precludes the admission to the United States of any alien "if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States."[6]

Pursuant to the authority conferred by Presidential Proclamation No. 2523, the Secretary of State, with the concurrence of the Attorney General, issued regulations codified, on July 30, 1947, as Part 175 of Title 8 of the Code of Federal Regulations.

8 C. F. R. 175.57 provides:

> *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the

[6] Although the war with Japan ended April 28, 1952, the powers exercised under the Passport Act of 1918, as amended, have specifically been preserved by Congress. See Public Laws 313, 368 and 393, 82nd Cong., 2d Sess.

alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

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No. 139

In the Supreme Court of the United States

OCTOBER TERM, 1952

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 139

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

The opinions of the Court of Appeals (R. 29–37) are reported at 195 F. 2d 964. The opinion of the District Court (R. 19–25) is reported at 101 F. Supp. 66.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1952 (R. 38–39). The petition for a writ of certiorari was filed on June 18, 1952,

and was granted on October 13, 1952 (R. 41). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an alien, excluded from admission to the United States on security grounds, may be temporarily admitted by the courts for the reason that, since no other country has been found which is willing to accept him, his continued exclusion amounts to an unlawful detention.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 39–51.

STATEMENT

In October, 1951, the respondent, an alien, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, seeking his release on the ground that he had been detained on Ellis Island since December, 1950, and that there was no place to which he could be deported (R. 2–5).

From the petition, return, and opinion of the District Court, the following facts appear:

Respondent is an alien of uncertain antecedents whose parents were Hungarian or Roumanian (R. 20) but who claims to have been born in Gibraltar (R. 2). He resided in the United

States from 1923 to 1948 (R. 2, 20).[1] In 1948 he left the United States, allegedly to visit his dying mother in Roumania, but never reached that country, because he was denied permission to enter (R. 2). He remained in Hungary for 19 months (R. 2).

Early in 1950, respondent left Hungary after obtaining an immigration visa for entry into the United States as an immigrant (R. 2).[2] However, upon his arrival at New York, February 9, 1950, he was ordered temporarily excluded by an immigration inspector pursuant to the provisions of the Passport Act as amended (22 U. S. C. 223) and 8 C. F. R. 175.57 (R. 3, 5). Pending disposition of his case he was removed to Ellis Island. After reviewing the evidence, the Attorney General on May 10, 1950, ordered that the temporary exclusion be made permanent without a hearing

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[1] In his petition below, respondent stated that he had been admitted for permanent residence (R. 2), but the District Court noted that the Government alleged that he had never been admitted for permanent residence (R. 20). At a hearing on the conditions of bail on remand of the cause pursuant to the mandate of the Court of Appeals, respondent admitted that he had not legally entered the United States.

[2] Respondent alleged that he is married to an American citizen (R. 2), but did not state, as the Immigration Service files show, that the marriage was entered into in Hungary in 1949, when he sought to return to the United States. Moreover the court below is in error in stating that respondent has American children. On the hearing on the remand, he admitted that he has none. According to the Immigration Service files, respondent's wife has four children by a previous marriage, the youngest of whom is 36 years old.

before a Board of Special Inquiry, on the basis of evidence of a confidential nature, the disclosure of which would be prejudicial to the public interest (R. 3, 5). That determination under 22 U. S. C. 223 and 8 C. F. R. 175.57 was based on a finding that respondent's entry would be prejudicial to the public interest for security reasons (R. 6).

Efforts to remove the respondent from Ellis Island have thus far been unsuccessful. France has twice turned respondent back from its borders, taking the position that he had merely embarked there and refusing to accept him unless there was some assurance that he would be received in another country (R. 3, 10). On one of the trips to France, an effort was made to land respondent in the United Kingdom, but the British authorities likewise refused to take him, presumably because he did not appear to be a British citizen (R. 10, 11). The Immigration and Naturalization Service has sought to obtain travel documents on respondent's behalf from Hungary, but thus far the Hungarian government has not announced any decision on such application (R. 7–8). Respondent also has applied unsuccessfully for entry into 12 Latin American countries (R. 12–17), but alleges no effort on his own part to secure permission to enter Roumania or Hungary. After one of respondent's petitions for habeas corpus had been denied, in June, 1951, respondent told an officer of the Immigration

Service that he intended to make no further effort to depart from the United States (R. 7).

In the meantime respondent has been housed and fed at Ellis Island. He has asserted that he was being unlawfully confined and has sought relief in the courts. Three writs of habeas corpus were dismissed and a petition for a fourth writ was denied, all by the United States District Court for the Southern District of New York (R. 4). However, on October 22, 1951, a fifth habeas corpus proceeding was commenced and a writ was issued (R. 1–2).

After hearing, Judge Irving R. Kaufman held on November 9, 1951, that the respondent's "detention" apparently had been excessively prolonged and that the writ of habeas corpus would be sustained unless the Government permitted the court to examine the evidence against respondent *in camera* (R. 24–26). This the Government declined to do. On December 14, 1951, Judge Kaufman signed a final order sustaining the writ of habeas corpus and directing that respondent be discharged on parole under certain conditions, including requirements that he report regularly and furnish a bond in the sum of $5,000 (R. 26–27).

On appeal, the United States Court of Appeals for the Second Circuit affirmed Judge Kaufman's order, holding that respondent was entitled to release because his "detention" had been excessively prolonged. It directed a reconsideration of the

terms under which release was to be authorized (R. 35–36).[3] In his dissenting opinion, Judge Learned Hand took the position that respondent, as an applicant for entry into the United States, could claim no constitutional rights and could not compel the United States to receive him; that his sojourn ashore, instead of being prevented from leaving the vessel on which he arrived, was merely a privilege granted him which conferred no status; and that the court had no authority to permit the entry of an alien whom the Attorney General had barred as potentially dangerous (R. 36–37).

SUMMARY OF ARGUMENT

I

Although this proceeding arises on a petition for habeas corpus, it actually involves the right of an alien to temporary entry into the United States in the face of a determination by the Attorney General that his entry would impair the public interest. The order of the district court does not merely grant the respondent his freedom; it gives him a privilege he never possessed.

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[3] In conformity with the direction of the Court of Appeals, Judge Kaufman on May 2, 1952, issued a modified order which reduced the bail to the sum of $3,000 and permitted respondent to travel and to reside in Buffalo, New York. Respondent has posted bail and has been released under the court's order.

The exclusion order here involved was issued under the Passport Act of 1918. 22 U. S. C. 223; Appendix, *infra*, p. 39. The respondent had asked for entry into the United States and had been denied that privilege by the Attorney General without a hearing on the basis of a finding that disclosure of the confidential information underlying the order of exclusion would be prejudicial to the public interest. This type of proceeding is to be distinguished from one in which an alien within our borders is apprehended and subjected to a proceeding looking toward deportation.

Congress has carefully distinguished between the two types of proceeding. The exclusion proceeding is summary and direct; it may be completed without a hearing. The deportation proceeding must include a hearing; suspension of the order in appropriate cases is provided for; and the other aspects of deportation are spelled out. The courts, too, have recognized the distinction between the two types of cases. A comparison of *Nishimura Ekiu* v. *United States*, 142 U. S. 651, with *The Japanese Immigrant Case*, 189 U. S. 86, in the early days of our immigration law, or of *Knauff* v. *Shaughnessy*, 338 U. S. 537, with *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, in the last few years, makes this distinction clear. The alien has only such rights as Congress sees fit to grant in exclusion proceedings; he is fully protected in deportation.

Thus it is clear that an exclusion case is not transformed into a deportation case merely because the alien has been housed on Ellis Island. In law he is still deemed at the border.

C. THE REAL ISSUE RAISED IN THIS PROCEEDING IS THE RESPONDENT'S RIGHT TO A TEMPORARY ENTRY AS AGAINST CONTINUED EXCLUSION

The restraints placed on the respondent arise from the circumstance that at the same time that the United States has refused him admission, the country from which he came and others to which he has applied for admission, have refused to take him.[8] Thus, for the present at least, his liberty is restrained and he must remain on Ellis Island. Such restraint has been held a sufficient basis for a petition for habeas corpus. *Chin Yow* v. *United States*, 208 U. S. 8.

Nevertheless, it is not the purpose of the petitioner to confine the respondent; the Government's only intent is to continue to bar his entry into the United States in accordance with the order of the Attorney General. As the return in this case stated, "The relator is not being detained in the usual sense but is in custody solely to prevent him from gaining entry to the United States in violation of law. He is free to depart from the United States to any country of his own choice" (R. 7). The

[8] Except for the fact that the United States is providing the respondent with shelter and food, it is in a sense no more restraining his movement than are France and England.

United States does not want the respondent to be available for any purpose, does not care when he goes, how he goes, or where he goes, as long as he goes east rather than west. On the other hand, the result of the district court's order is not merely to relieve the respondent of restraint but is also to effect his entrance into the United States. The court did not restore him to the position he was in before he applied for entrance, for he was then outside the United States; rather, at least temporarily, it granted him the privilege which he had been denied by the order of the Attorney General, namely, admittance to this country.

The distinction between this situation and that in a deportation proceeding is more than a formal one; certain results inevitably flow from it. Thus, if the court below is correct in determining that an alien who can find no country to give him refuge is entitled to at least temporary admittance here, it follows that the more undesirable an alien is, the better are his chances of admission, since the less likely he is to find other countries willing to accept him. In fact, if he is undesirable enough, he may attain what amounts to permanent residence in this country since no other nation will ever take him. Or, looked at from another angle, a foreign nation would be able to overcome our policy of excluding its agents by the simple

procedure of shipping them to our shores and then shutting the door on their return.

The nature of the restraint in this case is also significant in determining the length of time which it may be permitted to continue. Some cases dealing with deportation have established the principle that an alien may not be confined indefinitely while the Immigration Service seeks to carry out an order of expulsion. *Janavaris* v. *Nicolls*, 47 F. Supp. 201 (D. Mass.); *United States ex rel. Consola* v. *Karnuth*, 63 F. Supp. 727 (W. D. N. Y.).[9] Moreover, recent amendments to the immigration law, provided in the Internal Security Act of 1950, limit the period of confinement pending deportation to six months: 8 U. S. C., Supp. V, 156. Such limitations are appropriate because confinement in deportation cases is merely a step in aid of expulsion and, if too long continued, the confinement takes the place of the deportation which was ordered. However, such reasoning has no application to a restraint the purpose of which is purely to exclude, for there the exclusion is the ultimate step authorized by Congress and it must be continued so long as the exclusion order remains in effect. In this case the order of exclusion under the Passport Act must be considered to continue, unless revoked, until the end

[9] When this theory is carried over to exclusion cases, as it was in *Staniszewski* v. *Watkins*, 80 F. Supp. 132 (S. D. N. Y.), we believe it is erroneously applied.

of the emergency proclaimed by the President on December 16, 1950. Proclamation 2914, 3 C. F. R. (1950 Supp.) 71. At the end of the emergency the respondent may, of course, reapply for admission.

The remainder of the argument is almost entirely dependent upon the analysis made above. If it is clearly understood that the confinement in this case is merely the result of a combination of a denial of entry by the United States and a refusal by other countries to accept the respondent, then it becomes equally clear that the relief sought is, in effect, that the Government should cease to carry out its exclusion order. But, as we shall point out in the subsequent portions of this brief, Congress not only authorized, but required, the continuance of the exclusion, and the respondent has no statutory or constitutional right which is impaired thereby.

II

THE CONTINUED EXCLUSION OF THE RESPONDENT, PENDING THE FINDING OF A PLACE OF REFUGE, IS NOT ONLY AUTHORIZED BUT REQUIRED BY THE IMMIGRATION LAW

The decision of the court below rests in part on the view that Congress did not grant, or intend to grant, authority to the Attorney General to continue an excluded alien in detention under the

circumstances here present. (R. 32.)[10] An analysis of the statutory scheme reveals, however, that Congress has not only bestowed such power, but has also commanded its exercise in a case of this sort.

The structure of the immigration laws is as follows: Section 3 of the Immigration Act of 1917 provides for the exclusion of certain classes of aliens (8 U. S. C. 136). This list has been supplemented from time to time (8 U. S. C. 137), the most recent additions being made by the Internal Security Act of 1950 (64 Stat. 1006). In addition, the Passport Act of 1918, as amended (22 U. S. C. 223, Appendix, *infra*, p. 39) authorizes the President to impose added restrictions on the entrance of aliens during the present emergency.[11] Both the Internal Security Act (8 U. S. C., Supp. V, 137–4) and the regulations under the Passport Act (8 C. F. R. (1949 ed.) 175.57) provide for the exclusion of an alien without a hearing, where disclosure of confidential information would prejudice the public interest. As pointed out in the

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[10] The court's reference to 8 U. S. C., Supp. V, 137–4 (R. 32) is inaccurate, since the exclusion here was effected under 22 U. S. C. 223. As pointed out above, the six-months' limitation on imprisonment under the deportation provisions emphasizes the distinction between deportation and exclusion.

[11] The visa carried by the respondent gave him no right of admission which could not be taken away at the time of arrival. (8 U. S. C. 202 (g); *Chang Chan* v. *Nagle*, 268 U. S. 346, 352; *Sohaiby* v. *Savoretti*, 195 F. 2d 139, 140 (C. A. 5)).

The only reason that this case carries any of the color of the deportation cases is that instead of being sent back on the vessel on which he arrived, the respondent was granted temporary refuge on Ellis Island. Under the specific provisions of the immigration law (8 U. S. C. 151, Appendix, *infra*, pp. 47–48) and the decided cases (*Kaplan* v. *Tod*, 267 U. S. 228; *Chin Yow* v. *United States*, 208 U. S. 8; *United States* v. *Ju Toy*, 198 U. S. 253), this makes no difference in respondent's rights. But the combination of his being on Ellis Island, plus the refusal to permit him to land, plus the refusal of other countries to accept him, results in a present confinement. The fact that he was given the privilege of leaving the vessel, which is responsible for the present detention, gives him no legal rights he did not have before.

Although the appropriateness of habeas corpus as a remedy in this situation is not contested, the nature and purpose of the restraint has certain consequences. For one thing, to grant habeas corpus not only relieves the respondent of restraint, it also grants him temporary entry into the United States over the order of the Attorney General. Moreover, it leads to the absurd result that the more undesirable an alien is, the better are his chances of forcing an entry by way of court action, since his very undesirability lessens his chance of finding refuge elsewhere and increases the length of his detention. In fact, if

he is undesirable enough it may be impossible ever to find any other country to take him and his entry may become permanent. It is the position of the United States that since the restraint is not incidental to an order but is, itself, the effectuation of the exclusion order, there is no limit to its continuance other than the statutory time limit on the authority of the Attorney General to exclude him.

II

The decision of the court below appears to be based, in part at least, on the theory that Congress did not grant the Executive authority to detain an alien under the circumstances of this case. What Congress has done is not only to authorize, but to direct, the exclusion of aliens whose presence would be detrimental to the public interest. It was originally contemplated that such aliens would be promptly returned on the vessels which brought them, and the permission to stay at Ellis Island is merely an amelioration of the summary remedy in order that more time can be given to the consideration of the cases. But the so-called detention is still merely a continuation of the exclusion which is specifically authorized by Congress. Although the statutes permit the release on bail of aliens involved in deportation proceedings, and direct this relief after six months if deportation is not completed, there is no com-

parable provision in connection with exclusion. Specifically, the Attorney General is authorized to permit temporary entry only if the alien is a necessary witness on behalf of the United States in a prosecution, a circumstance which is not even suggested in the present case.

The authority of the Attorney General is, therefore, to continue the exclusion of the respondent for the duration of the present emergency, and his detention must last throughout that period unless he finds another country to grant him refuge or unless the exclusion order is revoked.

III

The order excluding the respondent from entry is not itself directly under attack in this proceeding, but since the release of the respondent on habeas corpus grants him a temporary entry into the country, the result of the order is a reversal of the Attorney General's determination that the respondent should be excluded. It is well-established that it is not the function of the courts in dealing with petitions for habeas corpus in immigration cases to review the exercise of a statutory authority by the executive. *Polymeris* v. *Trudell*, 284 U. S. 279; *Knauf* v. *Shaughnessy*, 338 U. S. 537.

The court below went even further afield when it sought to justify its actions on the basis of the assumption that the welfare of the nation could

be as well protected by surveillance and criminal prosecution as by continued exclusion. Certainly, the choice of the appropriate remedy was for Congress and not for the courts. *United States* v. *Curtiss-Wright Corporation*, 299 U. S. 304.

And finally, there was no reason to interfere in the proceeding in order to protect any constitutional rights vested in the respondent. From the earliest immigration cases to the latest, it has consistently been held that no alien has any constitutional right to entry into the United States. The *Chinese Exclusion Case*, 130 U. S. 581; *Knauff* v. *Shaughnessy*, 338 U. S. 537. It is inconceivable that the refusal of other countries to accept an alien increases his right to entry here. Rather, his entire rights are those granted him by Congress, and due process is provided by conforming to the procedures laid down in the statutes. Therefore, this alien seeking entry into the United States has no constitutional right to force his way in over the exclusion order of the Attorney General.

ARGUMENT

I

THE LEGALITY OF THE RESTRAINT IMPOSED ON THE RESPONDENT MUST BE DETERMINED IN LIGHT OF THE FACT THAT IT RESULTS FROM THE CONTINUED EXCLUSION OF THE RESPONDENT RATHER THAN FROM CONFINEMENT IN ORDER TO EFFECTUATE SOME OTHER GOVERNMENTAL ACTION

A. BOTH THE STATUTORY PROCEDURES AND THE ALIEN'S CONSTITUTIONAL RIGHTS ARE DETERMINED BY THE FACT THAT HE IS BEING PREVENTED FROM ENTERING RATHER THAN BEING DEPORTED AFTER ENTRY

Both Congress and the courts have long recognized the very real distinction between exclusion and deportation. In the case of the former, aliens outside the United States apply for admission at our frontiers, and the order involved is one either granting or refusing them permission to enter. In the case of deportation, on the other hand, an alien who is actually in this country is apprehended and, if found deportable, ordered expelled to some foreign country. The difference is between merely preventing entrance and actual expulsion.

The present case is one of exclusion. It arises under the so-called Passport Act, as amended (22 U. S. C. 223, Appendix, *infra*, p. 39), under which, during the present emergency, the President, and, by delegation, the Attorney General, is authorized to prevent the entry of aliens whose "entry would be prejudicial to the interests of the United States." Presidential Proclamation No.

2523, 6 F. R. 5821; Presidential Proclamation No. 2850, 14 F. R. 5173, Appendix, *infra*, pp. 40–43. Under regulations issued by the Secretary of State, with the concurrence of the Attorney General, the entry of various classes of aliens is designated as prejudicial to the interests of the United States (8 C. F. R. 175.53, Appendix, *infra*, pp. 43–45), and the Attorney General is authorized to exclude without a hearing when the exclusion is based on confidential information the disclosure of which would be prejudicial to the public interest (8 C. F. R. 175.57, Appendix, *infra*, p. 46). In this case the Attorney General made the necessary determination and ordered the respondent excluded (R. 5).

The procedure followed in this case is authorized with respect to aliens seeking to enter the United States; it has no relation to proceedings against aliens who are present within our borders and whose continued presence is found undesirable. The provisions of the Passport Act are to

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[4] Although the proceeding in this case took place under the Passport Act, in other cases and times exclusion can, of course, be effected under the immigration law itself, specifically, under 8 U. S. C. 136, 137, 151–154. And under 8 U. S. C., Supp. V, 137–4 exclusion of subversive aliens may be carried out without a hearing if disclosure of confidential information would be required to the prejudice of the interests of the United States. The Immigration and Nationality Act of 1952 (Public Law 414, 82d Cong., 2d sess., 66 Stat. 163) continues the provisions of the Passport Act in Section 215 and of the present Immigration Law in Section 235 (c).

be contrasted with the provisions of the immigration law dealing with deportation. 8 U. S. C. 155–157. Under those provisions an alien is entitled to a hearing; the order of deportation may be suspended in appropriate cases; the places to which the alien may be deported are prescribed; and the length of time that he may be held in detention until deportation can be completed is limited. None of these provisions applies to exclusion.

The difference in the two classes of cases is reflected not only in their legislative treatment, but also by the rights which the courts have recognized as inhering in the aliens involved. Thus, it has long been held that an alien is entitled to a fair hearing before deportation. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *The Japanese Immigrant Case*, 189 U. S. 86; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. On the other hand, an alien applying for entry may be excluded under such procedures as Congress may have adopted as appropriate. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *The Chinese Exclusion Case*, 130 U. S. 581; *Knauff* v. *Shaughnessy*, 338 U. S. 537.[3] The court below pointed out in

[3] The well-established proposition, that an alien who voluntarily leaves the United States, even though resident here, is, upon his return, subject to the same rules of exclusion as on initial entry, has not been questioned in this case. See, *e. g.*, *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547–548; *Hansen* v. *Haff*, 291 U. S. 559, 561–562; *United*

some detail other constitutional rights including the privilege against self-incrimination, reasonable bail, protection from cruel or unusual punishment, freedom of speech, and freedom from unreasonable searches and seizures, accorded to aliens in various deportation cases (R. 32). What the court failed to note was that these rights were accorded only in deportation cases, whereas in exclusion proceedings this Court has stated in *Knauff* v. *Shaughnessy*, 338 U. S. 537, at 544: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

States ex rel. Volpe v. *Smith*, 289 U. S. 422, 425; *United States ex rel. Stapf* v. *Corsi*, 287 U. S. 129, 132; *Lewis* v. *Frick*, 233 U. S. 291, 297; *United States ex rel. Kwong Hai Chew* v. *Colding, et al.*, 192 F. 2d 1009 (C. A. 2), pending on writ of certiorari, No. 17, this Term.

This brief was completed before a decision had been announced in *Kwong Hai Chew* v. *Colding*, No. 17, this Term, which was argued before the Court on October 17, 1952. If this Court should decide in that case that the petitioner there was entitled to a hearing on grounds applicable to the respondent in the present case, then the exclusion order here involved would have to be reconsidered on the basis of a hearing. The purpose of the respondent's continued detention would then shift from the continuation of an exclusion order to barring admittance during the pendency of the exclusion proceeding.

B. THE FACT THAT IN THIS CASE THE RESPONDENT HAD BEEN GRANTED A HAVEN ON ELLIS ISLAND, RATHER THAN BEING FORCED TO REMAIN ABOARD THE VESSEL ON WHICH HE ARRIVED, GAVE HIM NO ADDITIONAL STATUTORY OR CONSTITUTIONAL RIGHTS

Practical considerations have compelled a distinction between aliens applying for admission at our land borders and those seeking entry at our seaports. An alien applying from contiguous territory at a land border port presents no practical difficulty. If his right to enter is questioned, he usually returns to his home and comes back for any further required or authorized process. He thus remains physically outside the United States until a final determination is made. An excluding decision in his case is self-executing and requires no further implementation; he is simply not admitted. And the courts will not interfere. *Polymeris* v. *Trudell*, 284 U. S. 279.

Aliens who, like the respondent, are brought to the United States by vessel and apply for admission at seaports present another problem. In the earliest days of immigration enforcement, such aliens whose admissibility was questioned were detained on board the vessel while their right to land was being determined.[6] Experience soon demonstrated, however, that detention on board the vessel resulted in unnecessary hardship. At seaports, arriving vessels usually operate under

[6] A similar process still obtains in regard to alien seamen. 8 C. F. R. 120.34 and 120.35.

tight sailing schedules. A requirement that such vessels remain in port until doubtful cases are finally decided would be very costly to the transportation lines. Moreover, the need for haste in such cases might preclude careful consideration of the alien's claims. Consequently, for many years the immigration statutes have permitted temporary removal of the alien to temporary quarters ashore while his right to enter is being adjudicated.

The present statutory provision is found in 8 U. S. C. 151, Appendix, *infra*, pp. 47–48. So far as Congress was concerned, it is clear that Congress intended not to give the alien any of the rights of a person who has been allowed to enter the United States. Specifically, Congress declared that the temporary shelter given the alien "shall not be considered a landing" and shall not relieve the vessel of its obligation to remove the alien if he is ordered excluded.[7]

This Court in a long line of cases has consistently held that an alien's rights are not affected by such temporary arrangements. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *Chin Yow* v. *United States*, 208 U. S. 8, 12; *Kaplan* v. *Tod*, 267 U. S. 228, 230; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 543.

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[7] This provision is continued in the Immigration and Nationality Act of 1952 as Section 233. 66 Stat. 197.

And, finally, in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, this Court stated, at 588, that

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Although neither the district court nor the court below asserted the specific authority to review political determinations by Congress or the Executive, it is inescapable that that is the true content of their decisions. Thus the first opinion and the intermediate order of the district court were designed to require the disclosure, *in camera* if necessary, of the factual basis for the respondent's exclusion (R. 24–26) in order that the court might determine whether the risk in the particular case supported his continued exclusion.[19] On

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[19] This action appears to be in direct conflict with the views expressed by this Court in *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, at 111:

"* * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in

failure of the Government to disclose the information, the district court ordered the respondent discharged on bond (R. 26).

Although the majority of the court below professed its adherence to the theory that the Attorney General has power to exclude arriving aliens for security reasons without a hearing, it disparaged and actually defeated the order barring entry in this case. The court seems to have assumed that because the confidential information could not be revealed, it was insubstantial; and it seems to have accepted respondent's self-serving statement that the primary ground for his exclusion was his membership in the International Workers Order (R. 3).[20] It is clear that the court was not in a position to know or evaluate the information on which the exclusion was predicated. Certainly, the court was not justified in assuming that the action was arbitrary.

The court below adverted to the long period of the respondent's prior residence in the United States and the absence of any indication of overt acts of subversion (R. 34). And so the court apparently concluded that the public safety could be sufficiently guarded by keeping the respondent

[20] The Attorney General should not be forced into disclosing confidential facts which should be withheld in the public interest by the fact that an alien makes certain representations as to the basis of his exclusion.

preceding portion of this brief, an alien may be transferred to an immigration facility pending a determination on his application for admittance, but the transfer has no effect on his substantive rights. See pp. 16 to 18 *supra*.

The statutory provision for execution of an order for exclusion is simple and direct. "All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper." (8 U. S. C. 154, Appendix, *infra*, pp. 48–51).[12] If the alien has been temporarily removed and detained on shore, the statute makes it unlawful for the carrier to refuse to receive him back on board and provides sanctions for such refusals. The law clearly contemplates that the Attorney General will make the adjudication and that the transportation line will give it effect.

The statute is silent with respect to the situation presented here, where the country from which the

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[12] The provisions of this section are addressed, not to the Government or to the aliens, but to the transportation lines, and are designed to protect excludable aliens from exploitation by transportation lines desirous of obtaining passengers. *United States* v. *Nord Deutscher Lloyd*, 223 U. S. 512, 517; *Ng Lin Chong* v. *McGrath*, decided July 3, 1952 (C. A. D. C.), not yet reported. And see Senate Report No. 352, 64th Congress, 1st Session, on H. R. 10384, which became the Immigration Act of 1917 (p. 13).

respondent came refuses to receive him back.[13] The Act contains no provision for relief of a vessel unable to discharge its duty or its unwelcome passenger. However, Congress certainly did not authorize the Attorney General to grant entry to such an alien and set him at large in the United States, on bond or otherwise. The bail provisions of 8 U. S. C., Supp. V, 156, discussed in *Carlson* v. *Landon*, 342 U. S. 524, are not applicable to exclusion proceedings.[14] The only excluded aliens whom the law specifically permits to be ad-

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[13] *United States ex rel. Consola* v. *Karnuth*, 63 F. Supp. 727, 730 (W. D. N. Y.), and *Bellaskus* v. *Crossman*, 164 F. 2d 412 (C. A. 5), reversed, 335 U. S. 840, cited by respondent as describing the place to which the excluded alien must be sent (Memorandum in Opposition, p. 2), are inapplicable. Those cases dealt with aliens in *expulsion* proceedings and involved 8 U. S. C. 156, which prescribes the countries to which such aliens may be deported. The provisions of this section have no application to an excluded alien, such as respondent. *Wah* v. *Shaughnessy*, 190 F. 2d 488 (C. A. 2).

[14] See *United States ex rel. Chu Leung* v. *Shaughnessy*, 88 F. Supp. 91, 93 (S. D. N. Y.):

"Furthermore, it should be noted that the administrative proceeding in this case was exclusion and not deportation and the statutory authority vested in the Attorney General who in his discretion 'may' grant bail applies only to deportation proceedings."

And see *United States ex rel. Soo Hoo Chew Yee* v. *Shaughnessy*, 104 F. Supp. 425, 427 (S. D. N. Y.):

"But there is no provision for statutory bail under these facts, for the administrative proceeding here was in the nature of exclusion and not deportation. There is no statutory authority vested in the Attorney General or any other executive officer to grant bail in such a proceeding. Such authority applies only to deportation proceedings."

mitted on bond are those whose testimony is necessary on behalf of the United States in certain criminal prosecutions (8 U. S. C. 154, Appendix, *infra*, p. 50). Manifestly, the respondent is not within that class.[15]

In 1950, the Senate Judiciary Committee, after exhaustive investigation of our immigration laws and practices, rejected a proposal that excluded aliens be admitted under bond. The Committee recognized that "to permit them to enter the United States under bond would bring about the very thing that Congress intended should not be done." See Senate Report No. 1515, 81st Congress, 2d Session, pp. 643–644.

Greater discretionary authority will be vested in the Attorney General by Section 212 (d) (5) of the Immigration and Nationality Act, Public Law 414, 82nd Congress, 2d Session, effective December 24, 1952. That provision will authorize the Attorney General to parole an alien applicant into the United States temporarily "for emergent reasons or for reasons deemed strictly in the public interest." The Congressional intent underlying this provision is stated at page 52 of House Report No. 1365, 82nd Congress, 2d Session, on H. R. 5678:

> The Committee believes that the broader discretionary authority is necessary to per-

[15] Comparable provision is made in Section 237. (d) of the Immigration and Nationality Act, Public Law 414, 82nd Congress, 2d Session, effective December 24, 1952.

> mit the Attorney General to parole inadmissible aliens into the United States in emergency cases, such as the case of an alien who requires immediate medical attention before there has been an opportunity for an immigration officer to inspect him, and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or for purposes of prosecution.

Even after this new power becomes effective on December 24, no grounds have been shown which would indicate that the Attorney General would have a factual basis to exercise his authority in this case. No medical emergency is presented and since the Attorney General has found that the respondent's entry would be prejudicial to the interests of the United States, he would scarcely be considered eligible for discretionary relief designed by Congress exclusively for aliens whose entry is deemed necessary in the public interest.

The statutory scheme thus authorizes the Attorney General (1) to exclude certain classes of aliens, (2) to transfer an alien from ship to shore, pending the determination of his admissibility, (3) to return him to the country whence he came if he is found deportable, and (4) to permit his temporary entry only if medical emergency or public interest so requires. That the statute does not specifically provide for continued restraint on

the failure of successive attempts to deport an alien does not preclude such action, since, as pointed out above, there is no confinement as such, but only a continued refusal to permit entry into the United States which, when combined with the refusal of other countries to accept an alien, results in a restraint on his freedom. It was clearly the intention of Congress that aliens such as respondent, who have been properly excluded on security grounds, should not be permitted at large in this country. In refusing entry to the respondent, the Attorney General was merely carrying out this obligation under the law.

After he was excluded from this country, the respondent was returned to the vessel and transported abroad. France and Great Britain refused to receive him and the vessel brought him back to our shores. At that point, the Attorney General had three alternatives. He could have (1) refused to permit him to leave the vessel; (2) permitted him ashore until he could find asylum elsewhere; (3) allowed him to land and go at large under bond. The first alternative was properly rejected as inhumane, since it would have left respondent indefinitely to roam the seas. The third alternative could not be countenanced, since it would fly in the face of the Congressional mandate. The second alternative, which was the course pursued, represents the least undesirable selection in such a Hobson's choice.

The court below formulated its determination that the detention had exceeded the Attorney General's authority by first assuming "the power to hold can never be broader than the power to remove or shut out" (R. 31). Then it went forward to state that continued detention "is justified only as a means necessary to carry out his [respondent's] lawful removal from the country" (R. 32). If this were a deportation proceeding, this latter statement would be sound. But what it overlooks is the power, referred to in the prior statement, to "shut out," which is actually the objective in exclusion proceedings. This is not the type of restraint dealt with in *Janavaris* v. *Nicolls*, 47 F. Supp. 201 (D. Mass.), where the object was to keep the alien available for a hearing on deportation. That restraint is in aid of the power to remove. Here the restraint follows from the shutting out of the alien. The Attorney General has found that respondent's entry would be prejudicial to the public interest (R. 6). So long as that finding is outstanding, the restraint resulting from exclusion cannot be regarded as unreasonably prolonged regardless of how long it continues. See *Ludecke* v. *Watkins*, 335 U. S. 160; *Schwarzkopf* v. *Uhl*, 137 F. 2d 898 (C. A. 2). The mere fact that exclusion has been extended over a protracted period does not in itself warrant the assumption that it

is unreasonable. Thus, an alien enemy interned during time of war could hardly make a tenable complaint that his confinement must be ended because it had extended over a period of months, or even years. And a person barred from his home and usual occupation in a critical war zone likewise could not demand relief merely by invoking the calendar. *Korematsu* v. *United States*, 323 U. S. 214. It is only when confinement is prolonged beyond the needs defined by Congress that the detention of an excluded alien may become unreasonable. And where an alien is ordered excluded for reasons of internal security, pursuant to the mandate of Congress and the President, it cannot be unreasonable to continue his detention for the purpose of debarring him from the United States so long as his entry continues to be a menace to the safety of the United States.

One may reasonably inquire how long the Government proposes to keep the respondent at Ellis Island. The answer is that the mandate of Congress requires that he be barred from entering the United States and thus must remain on Ellis Island until (1) he voluntarily departs to some country of his own selection; or (2) until he is removed by the United States to the country whence he came; or (3) if neither of the first alternatives can be satisfied, until such time as the Attorney General determines that his entry no

longer will imperil the national safety; or (4) until the conclusion of the emergency."

Though the court below assumed that all efforts to bring about the respondent's admission to another country had been exhausted, that is not the case at all. The place to which he could most reasonably expect to return is Hungary, and the record is barren of any suggestion that he has ever applied to that country. Significantly, when he desired to enter Hungary in 1948 he experienced no difficulty in obtaining official approval for admission into that country. He stayed there for nineteen months, from 1948 to 1950, and was married there. Even though the United States has received no answer to its request that Hungary admit him (R. 8), past experience emphasizes the likelihood that respondent might well be found acceptable by Hungary, Roumania or other Iron Curtain countries if he himself made a *bona fide* application for admittance.[16] Cf.

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[16] Poland, for example, has accepted the Greek national who was the subject of *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (New York Times, November 13, 1952, p. 22) as well as Toma Babin, a Yugoslav (New York Times, January 22, 1950, p. 18). Other non-Poles recently received by Poland, according to information from the Immigration and Naturalization Service, include Nicolas Kaloudis (*United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, C. A. 2) and Theodoros Bafalukos (*United States ex rel. Bafalukos* v. *Murff*, 94 F. Supp. 643, D. Md.). George Pirinsky, a Bulgarian (*United States ex rel. Pirinsky* v. *Shaughnessy*, 177 F. 2d 708, C. A. 2) was deported to his native land (New York Times, August 3, 1951, p. 7). Other European aliens

United States v. *Spector*, 343 U. S. 169. The twelve Latin American countries alleged to have rejected him[17] patently have been marshalled for dramatic effect rather than because of any sincere expectation that they would receive him. Any alien not wanted here could probably find a long list of other countries which would *not* accept him. And, most significantly, respondent has declared that he would "make no further effort to depart from the United States and would do nothing except to attempt to remain in this country" (R. 7). That all doors are closed to respondent is far from definitely established.

But even if it were conceded that respondent's exclusion would continue to the end of the emergency and that during all of that time no foreign country would be willing to accept him, and that he must therefore remain on Ellis Island for the indefinite future, no alternative appears possible. If this situation be considered a hardship, it is a result of the current international situation and does not itself call for extraordinary relief.[18]

---

have succeeded in entering various Latin American countries. Ferenc Vajta, a Hungarian (*United States ex rel. Vajta* v. *Shaughnessy*, 179 F. 2d 137, C. A. 2) was deported to Colombia on February 7, 1950.

[17] Even those are not all outright rejections. In some instances the door is left open for further applications (R. 13, 17).

[18] The hardships flowing from enforcement of the immigration laws do not offend the Due Process Clause. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590–591. The courts have consistently held that such hardships furnish no war-

Moreover, as Justice Black pointed out in *Korematsu* v. *United States*, 323 U. S. 214, at 219, "hardships are part of war, and war is an aggregation of hardships." This observation is equally applicable to the present period of national peril.

III

THE DISTRICT COURT WAS WITHOUT AUTHORITY TO GRANT TEMPORARY ENTRANCE THROUGH HABEAS CORPUS, SINCE NO STATUTORY OR CONSTITUTIONAL RIGHTS OF THE RESPONDENT HAD BEEN IMPAIRED

A. THE COURT HAD NO AUTHORITY TO REVIEW THE DISCRETION EXERCISED BY THE EXECUTIVE PURSUANT TO CONGRESSIONAL AUTHORITY

Generally speaking, relief through habeas corpus is granted in immigration cases either when the rights of an alien have been impaired through failure to follow the procedures laid down by Congress (*Gegiow* v. *Uhl*, 239 U. S. 3; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33) or because some constitutional right has been violated. As we have pointed out in the preceding point, the

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rant for judicial intervention. *Commissioner of Immigration* v. *Gottlieb*, 265 U. S. 310, 313; *Sohaiby* v. *Savoretti*, 195 F. 2d 139 (C. A. 5); *Soewapadji* v. *Wixon*, 157 F. 2d 289 (C. A. 9), certiorari denied, 329 U. S. 792; *Kobayashi* v. *Carmichael*, 120 F. 2d 752, 753 (C. A. 9); *United States ex. rel. Giacone* v. *Corsi*, 64 F. 2d 18 (C. A. 2); *Todaro* v. *Munster*, 62 F. 2d 963 (C. A. 10), certiorari denied, 289 U. S. 738; *Clark* v. *Orabona*, 59 F. 2d 187 (C. A. 1), certiorari denied, 287 U. S. 629; *United States ex rel. Natali* v. *Day*, 45 F. 2d 112 (C. A. 2); *United States ex rel. Giletti* v. *Commissioner*, 35 F. 2d 687 (C. A. 2).

restraints imposed upon this respondent have not overstepped the statutory authority of the Immigration Service. This being so, the court had no authority to review the exercise of discretion by a coordinate branch of the Government in accordance with the authority granted by Congress. In a very early immigration case, *Nishimura Ekiu* v. *United States*, 142 U. S. 651, this Court stated, at page 660:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted to the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.

And in one of the most recent cases before this Court on the same subject, *Knauff* v. *Shaughnessy*, 338 U. S. 537, 542, 543, this Court stated:

> * * * an alien who seeks admission to this country may not do so under any claim of right. * * *
>
> * * * * *
>
> * * * Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.

under surveillance and prosecuting him for any crimes he might be discovered committing (R. 33–34). But this determination is directly contrary to the policy of Congress, expressed in both the Passport Act and the Immigration law. In both statutes, Congress sought to protect the public safety by the exclusion of aliens rather than through the enforcement of the criminal law. Both statutes entrusted to the Attorney General the authority to carry out this policy. It is not for the courts to grant entry, temporarily or permanently, in derogation of this policy. *Cf. United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–322.

B. NO CONSTITUTIONAL RIGHT OF THE RESPONDENT HAS BEEN IMPAIRED

Since it appears that the respondent has been deprived of no statutory right and that the court had no jurisdiction to review the exercise of discretion by the Attorney General, the only other possible basis for intervention through habeas corpus would be in order to protect some constitutional right of the alien.

There is one concept in the cases dealing with immigration which is clear beyond dispute; no alien has a constitutional right to enter this country. The United States, acting through Congress and the executive departments, may exclude any

or all aliens, designating those to be turned away in terms of race, activity, character, mentality, prior affiliation, or otherwise, and may admit them on such terms and conditions as it chooses to prescribe. *Harisiades* v. *Shaughnessy,* 342 U. S. 580; *Carlson* v. *Landon,* 342 U. S. 524, 534, 536; *Knauff* v. *Shaughnessy,* 338 U. S. 537; *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422, 425; *Low Wah Suey* v. *Backus,* 225 U. S. 460, 467–468; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 339–340; *Turner* v. *Williams,* 194 U. S. 279, 289–290; *The Japanese Immigrant Case,* 189 U. S. 86, 97; *Wong Wing* v. *United States,* 163 U. S. 228, 237; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 704–713; *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 659; *The Chinese Exclusion Case,* 130 U. S. 581, 603–604.

Since the only restraint imposed on the alien in this case was a prohibition against his entering this country, no constitutional right of the alien was denied him. On the other hand, the orders of the courts below gave to the alien a privilege which this Court has repeatedly held lies within the exclusive authority of Congress and the Executive to grant or withhold, thereby disregarding over sixty years of constitutional law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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DECEMBER 1952.

APPENDIX

1. Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U. S. C. 223), provides in pertinent part:

> When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe:
>
> * * * * *

(This Act has been continued in effect by Public Laws 313, 368, 393, and 450, 82d Cong., 2d Sess., 66 Stat. 54, 96, 137, and 330.)

2. Presidential Proclamation No. 2523 (6 F. R. 5821), as originally promulgated on November 14, 1941, provided in pertinent part:

> Whereas, the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of Congress approved on June 21, 1941 (* * * 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941 [citing 6 F. R. 2617], or as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and
>
> Whereas, the national emergency proclaimed by me on May 27, 1941, is still existing; and
>
> Whereas, there unhappily exists a state of war between or among two or more states * * *; and
>
> Whereas, the exigencies of the present international situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States * * *:
>
> Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, * * * do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed

upon the departure of persons from and their entry into the United States * * *; and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

* * * * * *

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

* * * * * * *

3. Presidential Proclamation No. 2850 (14 F. R. 5173), promulgated August 17, 1949, provides in pertinent part as follows:

* * * * * *

1. The said Proclamation No. 2523 is hereby amended so that paragraph numbered (3) thereof, together with the suc-

ceeding unnumbered paragraph, shall read as follows:

(3) (a) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe.

(b) No permit to enter shall be issued to an alien if it appears to the satisfaction of the issuing officer, or the Secretary of State, that the alien's entry would be prejudicial to the interests of the United States within the meaning of the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General.

(c) Notwithstanding the provisions of the foregoing paragraphs (a) and (b), no alien applying for admission, even with a valid permit to enter, shall enter or be permitted to enter the United States if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States.

2. All existing regulations promulgated under or pursuant to the said Proclamation No. 2523 are hereby ratified and confirmed

and shall be construed to have the same effect as if included in such proclamation * * *.

* * * * *

4. Pursuant to the authority conferred by Presidential Proclamation No. 2523, the Secretary of State, with the concurrence of the Attorney General, issued regulations (6 F. R. 5911–5918), which were from time to time amended and revised (10 F. R. 5889–5893; 10 F. R. 8993–8996, 8997–9002; 10 F. R. 15332, 15333–15335) and eventually codified, on July 30, 1947, as Part 175 of Title 8 of the Code of Federal Regulations (12 F. R. 5065, 5135–5142). These regulations provide in pertinent part (8 C. F. R. [1949 ed.], Part 175):

Part 175—Control of Persons Entering And Leaving The United States Pursuant To The Act of May 22, 1918, As Amended

* * * * *

ALIENS ENTERING

§ 175.52 *Refusal of permission to enter.* (a) No permit to enter shall be issued to any alien if the permit-issuing authority has reason to believe that the entry of the alien would be prejudicial to the interests of the United States.

* * * * *

§ 175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§ 175.41 to 175.62, inclusive:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended [anarchists, opposers of organized government, advocates of violent overthrow of the United States Government, etc.]. (* * * 8 U. S. C. 137).

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct * * * the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct * * * the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any re-

bellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (* * * 55 Stat. 252 * * *).

(i) Any alien enemy [with specified exceptions].

(j) Any alien found to be, or charged with being, a war criminal * * * or an[y] alien who has been guilty of * * * conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252 * * *) to safeguard.

* * * * * *

§ 175.57 *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it

appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry * * * shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

* * * * *

5. Section 15 of the Immigration Act of 1917, 39 Stat. 885, as amended, 8 U. S. C. 151, provides:

> That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or to send competent assistants to the vessel and there inspect all such aliens or said immigration officials may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve vessels, the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would under the provisions of this Act bind the said vessels, transportation lines, masters, agents, owners, or consignees: *Provided,* That where removal is made to premises owned or controlled by the United States, said vessels, transportation lines, masters, agents, owners, or consignees, and each of them, shall, so long as detention there lasts, be relieved of responsibility for the safekeeping of such aliens. Whenever a temporary removal of aliens is made the vessels or transportation lines which brought them and the masters, owners, agents, and consignees of the vessel upon which they arrive shall pay all expenses of such removal and all expenses arising during subsequent detention, pending decision on the 'aliens' eligibility to enter the United States and until they are either allowed to land or returned to the care of the line or to the vessel which brought them, such expenses

to include those of maintenance, medical treatment in hospital or elsewhere, burial in the event of death, and transfer to the vessel in the event of deportation, * * *

6. Section 18 of the Immigration Act of 1917, 39 Stat. 887–889, as amended, 8 U. S. C. 154, provides:

> That all aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came, except that detention expenses and expenses incident to detention, shall not be assessed against the owner or owners of the vessels on which they respectively came when the aliens are in possession of unexpired visas issued by the United States consuls within sixty days of the aliens' foreign embarkation if the sole cause of exclusion is one arising under section 13 (a) (1) or (3) of the Immigration Act of 1924 (43 Stat. 161–162; 50 Stat. 165; 46 Stat. 581; 8 U. S. C. 213 (a)–213 (f)). That it shall be unlawful for any master, purser, person in charge, agent, owner, or consignee of any such vessel to refuse to receive back on board thereof, or on board of any other vessel owned or operated by the same interests, such aliens; or to fail to detain them thereon; or to refuse or fail

to return them in the manner aforesaid to the foreign port from which they came; or to fail to pay the cost of their maintenance while on land as required by this section or section 15 of this Act; or to make any charge for the return of any such alien, or to take any security for the payment of such charge; or to take any consideration to be returned in case the alien is landed; or knowingly to bring to the United States any alien excluded or arrested and deported under any provision of law until such time as such alien may be lawfully entitled to reapply for admission to the United States; and if it shall appear to the satisfaction of the Attorney General that such master, purser, person in charge, agent, owner, or consignee has violated any of the foregoing provisions, or any of the provisions of section fifteen hereof, such master, purser, person in charge, agent, owner, or consignee shall pay to the collector of customs of the district in which the port of arrival is located, or in which any vessel of the line may be found, the sum of $300 for each and every violation of any provision of said sections; and no vessel shall have clearance from any port of the United States while any such fine is unpaid, nor shall such fine be remitted or refunded: *Provided*, That clearance may be granted prior to the determination of such question upon the deposit with the collector of customs of a sum sufficient to cover such fine. If the vessel by which any alien ordered deported came has left the United States and it is impracticable for any reason to deport the alien within a reasonable time by another vessel owned by the same interests, the cost of deportation may be paid by the Govern-

ment and recovered by civil suit from any agent, owner, or consignee of the vessel: *Provided further,* That the Commissioner of Immigration and Naturalization with the approval of the Attorney General, may suspend, upon conditions to be prescribed by the Commissioner of Immigration and Naturalization, the deportation of any aliens found to have come in violation of any provision of this Act if, in his judgment, the testimony of such alien is necessary on behalf of the United States Government in the prosecution of offenders against any provision of this Act or other laws of the United States; and the cost of maintenance of any person so detained resulting from such suspension of deportation, and a witness fee in the sum of $1 per day for each day such person is so detained, may be paid from the appropriation for the enforcement of this Act, or such alien may be released under bond, in the penalty of not less than $500, with security approved by the Attorney General, conditioned that such alien shall be produced when required as a witness and for deportation. No alien certified, as provided in section sixteen of this Act, to be suffering from tuberculosis in any form, or from a loathsome or dangerous contagious disease other than one of quarantinable nature, shall be permitted to land for medical treatment thereof in any hospital in the United States, unless the Attorney General is satisfied that to refuse treatment would be inhumane or cause unusual hardship or suffering, in which case the alien shall be treated in the hospital under the supervision of the immigration officials at the expense of the vessel transporting him: *Provided further,* That

upon the certificate of an examining medical officer to the effect that the health or safety of an insane alien would be unduly imperiled by immediate deportation, such alien may, at the expense of the appropriation for the enforcement of this Act, be held for treatment until such time as such alien may, in the opinion of such medical officer, be safely deported: *Provided further,* That upon the certificate of an examining medical officer to the effect that a rejected alien is helpless from sickness, mental or physical disability, or infancy, if such alien is accompanied by another alien whose protection or guardianship is required by such rejected alien, such accompanying alien may also be excluded, and the master, agent, owner, or consignee of the vessel in which such alien and accompanying alien are brought shall be required to return said alien and accompanying alien in the same manner as vessels are required to return other rejected aliens.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 139

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SUPREME COURT, U.S.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,

Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

For more than two years—from February 9, 1950 until May 2, 1952, respondent was detained and restrained of his liberty. He violated no law and he committed no crime. He was accused of no wrongdoing. No charges were ever lodged against him or made known to him. The petitioner asserts, that in a "very true sense" (R. 13) respondent was not detained, and yet during this period, Ignatz Mezei was incarcerated behind bars at Ellis Island, the same as any other detained alien.

Petitioner alleges that in the absence of any statutory provisions authorizing detention, and in spite of the Con-

stitution, the respondent may and should be restraine
of his liberty without reference to the calendar (and
haps for the rest of his natural life), without charging
with a crime, without notice of charges, and witho
hearing.

Respondent, a native of Great Britain came to the Un
States in 1923 and resided here for twenty-five years u
1948 when he went to Europe in an attempt to visit
dying mother. During his residence in the United Sta
respondent worked for the United States Coast Guard,
an air-raid warden, donated blood three times and enga
in the sale of United States war bonds (R. 4). In 1950,
spondent embarked from France in possession of app
priate documents and sought to reenter the United Sta
to reside here with his American citizen wife. He was
cluded on May 10, 1950 by the Attorney General witho
hearing pursuant to 8 C.F.R. 175.57 (R. 4-5).

The statutory basis for respondent's exclusion with
a hearing is the Passport Act of 1918 as amended, whi
presently calls for a national emergency or war betwe
two foreign states to be operative (22 U.S.C. 223).

An excluded alien may only be deported pursuant to
U.S.C. 154 to the country whence he came. Deportation in t
instant case is therefore limited to the country of embark
tion, France or the country of respondent's citizenship. *U.*
ex rel. Consola v. *Karnuth*, 63 F. Supp. 727 at 730; *Bellask*
v. *Crossman*, 164 F. 2d 412, reversed 335 U.S. 840. Franc
the country, of embarkation, and Great Britain, the cou
try of his nativity and citizenship, have refused to acce
respondent as well as 12 Latin American countries (R. 1
37). No claim is made that respondent is a citizen
Hungary, Roumania or of any other iron-curtain country, a
though petitioner seems to assume that deportation may h

directed to such countries in the absence of statutory authorization.

Respondent has asserted that there is no country to which he can be deported (R. 7, Par. 21). This allegation is deemed admitted by the Government because of its failure to controvert it. *Whitten* v. *Tomlinson*, 160 U.S. 231, 242. The courts below have moreover, found that the facts support this allegation (R. 38, 60) and such finding is not now subject to review since it is not clearly erroneous *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342.

Issue Presented

The issue presented is whether an excluded alien, whose removal or deportation cannot be effectuated because of lack of a receiving country, may, in the absence of statutory authorization and without regard to constitutional guarantees, be detained indefinitely or for the rest of his natural life at Ellis Island.

Argument

The decision below, 195 F. 2d 964 (R. 59), that an excluded alien may be enlarged or paroled, is consistent with this Court's declaration in *Wong Wing* v. *United States*, 163 U.S. 228, 235 that: "detention or *temporary confinement*, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid." It is in harmony with *Kaplan* v. *Tod*, 267 U.S. 228 which recognized that the parole of an excluded alien merely enlarged his prison bounds and did not result in his legal admission to the United States.

The power to release an excluded alien from continued unreasonable detention when deportation can not be effectuated has as noted below (R. 63) "been widely accepted by the district courts". *In re Krajcirovic*, 87 F. Supp. 379;

Staniszewski v. *Watkins*, 80 F. Supp. 132; *U. S. ex rel. Chu Leung* v. *Shaughnessy*, 88 F. Supp. 91.

There is no statute authorizing the detention of an excluded alien. The power to detain is read into our immigration laws as a necessary incident to the power to exclude. The court below adhering to this Court's views in *Wong Wing* v. *United States*, *supra*, properly confined this implied power to that of temporary detention for a reasonable time.

A contrary position finds no support in *Ludecke* v. *Watkins*, 335 U.S. 160 or *Schwarzkopf* v. *Uhl*, 137 F. 2d 898 in view of the *statutory* provisions there involved for the detention of dangerous alien enemies during a declared war. *Korematsu* v. *United States*, 323 U.S. 214 is likewise inapposite for it involved specific provisions for exclusion by the military of persons from critical war areas during hostilities and a declared war. And, *Carlson* v. *Landon*, 342 U.S. 524, petitioner's concluding authority for the proposition that prolonged and unreasonable detention has been authorized by Congress is equally inapplicable. The court below properly noted that the *Carlson* "opinion is in fact quite carefully limited to the case in hand." There, this Court stated at 342 U.S. 546 "that the problem of *habeas corpus* after unusual delay in deportation hearings is not involved in this case".

The very problem of the instant case is that of unusual delay—of over two years—in effectuating deportation in an exclusion case because no country will receive the respondent.

Conclusion

The decision below is in harmony with decisions of this Court. It is not in conflict with decisions of any other circuit. The contention of the petition, that indefinite detention of an alien at Ellis Island may be sanctioned in

peacetime in the absence of statute, and within the framework of our Constitution, is clearly without merit. We submit that the petition for a writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 139

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,

Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION,

Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL. IGNATZ MEZEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Statement

As a result of the decisions below, (101 F. Supp. 66, R. 19; 195 F. 2d 964, R. 29), the respondent is presently at large. But, for more than two years—from February 9, 1950 until May 2, 1952, he was detained and restrained of his liberty. He violated no law and he committed no crime. He was accused of no wrongdoing. No charges were ever lodged or made known to him. The Government asserts

that respondent was not detained in "the usual sense" (R. 7), and yet during this period, as counsel and anyone else could see with their very own eyes, Ignatz Mezei was was incarcerated behind bars at Ellis Island, the same as any other detained alien.

The government alleges that in the absence of any statutory provisions authorizing detention and notwithstanding the Constitution of the United States, the respondent might be so restrained (in the unusual sense) for the rest of his life, without charging him with a crime, without notice of charges and without a hearing.

Respondent alleges in his petition for habeas corpus (R. 2) that he is a native of Great Britain, 54 years of age; that he came to the United States on December 23, 1923 and remained here without interruption until May 17, 1948. He is married to an American citizen-wife, residing in Buffalo, and during the War he worked for the United States Coast Guard, was an air-raid warden, donated blood three times, and was engaged in selling United States war bonds (Par. 1-3). On May 17, 1948, he alleges that he visited Europe to see his dying mother; that thereafter he encountered difficulty in securing an exit permit from Hungary; that he thereafter returned to the United States on February 9, 1950 in possession of appropriate immigration documents (Par. 4-6). On February 9, 1950, he was temporarily excluded by the Immigration authorities pursuant to 8 Code of Federal Regulations 175.57 and that exclusion order was made permanent by the Attorney General on May 10, 1950 (Par. 7-8).

With the exception of two ocean voyages to France in unsuccessful attempts to return him there, respondent was detained continuously by the Immigration authorities since February 9, 1950, a period of two years (Par. 14-16). Four prior writs were brought in this case but each prior

writ was denied because the Government advised the Court that it was prepared to effectuate departure pursuant to the exclusion order of the Attorney General, to France (Par. 23-27). The Government admits its inability to deport respondent to France or to any other country (Gov't brief p. 4). Moreover, in February of 1951, the French Government requested this government to admit respondent to the United States (R. 10).

Paragraph 21 of the petition for habeas corpus alleges that there is no country which is willing to accept respondent pursuant to the order of exclusion which has been entered by the Attorney General, and paragraph 22 alleges that the respondent is unable to secure admission to any other country in the world (R. 4). Respondent has submitted documentary proof that he has been refused permission to enter some 15 countries, including England, the country of his nativity (R. 10-18). These allegations of the petition for habeas corpus were not controverted. The government merely alleges that it has been making an attempt to secure permission for respondent's return to Hungary (par. 14 of the Return, R. 7). It does not state when these efforts were first made, nor why it has been unable to conclude arrangements with Hungary since January of 1951 when it realized that deportation could not be effectuated to France. In addition, counsel has been advised by the Visa Division of the Department of State that since January, 1951—for two full years—negotiations looking toward deportation to Hungary have been conducted without any results.

It is also asserted by the government that respondent may not be released as a matter of law "since even his temporary release would constitute a security hazard" (R. 8) . . . an argumentative conclusory allegation upon which the courts below sought proof.

In addition to the claim that respondent's detention is

unlawful because he has been detained an unreasonable length of time, respondent alleges that his exclusion without a hearing is not based on confidential information which cannot be disclosed; that it is based upon alleged membership in the International Workers Order, an organization which he innocently joined solely for the purpose of insurance benefits; and that therefore, the Attorney General, contrary to his own regulations, has unlawfully and arbitrarily denied respondent a hearing (Petition, par. 8-13). The allegation that exclusion herein is based upon membership in the International Workers Order and that such membership was innocent is not denied in the Return (R. 5-8).

Statute Involved

Section 18 of the Immigration Act of 1917 (8 U. S. C. 154) provides:

> "All aliens brought to this country in violation of law shall be immediately sent back in accommodations of the same class in which they arrived, to the *country whence they respectively came*, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper."

Issues Presented

The issues presented herein are:

1. Whether an excluded alien, whose removal or deportation cannot be effectuated because of lack of a receiving country, may in the absence of statutory authorization and without regard to constitutional guarantees, be detained indefinitely or for the rest of his natural life at Ellis Island.

2. Whether the Attorney General may refuse to grant a hearing to an excluded alien upon security grounds, where it is established that he has not acted in good faith and that confidential information, if it exists, can be revealed.

3. Whether the Attorney General may refuse to reveal, even *in camera*, the basis for an alien's continued detention, where exclusion cannot be effectuated.

Point I

The Government Is Bound by the Undenied Allegations of the Habeas Corpus Petition and the Findings of the Court Below.

It would seem superfluous to review two well recognized principles of pleading and practice. However, the government's attempt to disregard them and its frequent references to matters outside the present record, necessitates this repetition.

First, it is axiomatic, that appellate courts will not disturb findings of trial courts, unless they are clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342; *Orvis* v. *Higgins*, 180 F. 2d 537. Secondly, under Rule 8 (d) of the Rules of Federal Practice, "averments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading." *McComb* v. *Blue Star Auto Stores Inc.*, 164 F. 2d 329, *cert. denied*, 332 U. S. 855; *Moore* v. *Linaham et al.*, 117 F. 2d 140, *cert. denied*, 314 U. S. 628; *Fontes* v. *Porter*, 156 F. 2d 956; *Zydney* v. *New York Credit Men's Ass'n*, 113 F. 2d 986; *Whitten* v. *Tomlinson*, 160 U. S. 231, 242.

Upon the record before this court, the following facts are therefore established in view of the failure of the government to deny any of the allegations of the petition for habeas corpus and in view of the findings of the District Court:

1. That the respondent, a native of Great Britain, resided here lawfully for twenty years, that he is married to an American citizen, and that he went to Europe in 1948 to visit his dying mother. He sought to return to the United

States with proper documents after experiencing difficulty in leaving Hungary (R. 2).

The Government cannot successfully contend that respondent was not lawfully admitted to the United States upon his first arrival here nor go beyond the record as it seeks to do at page 3, notes 1 and 2 of its brief. The record merely shows that respondent's visit to Hungary was a temporary one and that he was delayed there against his will (R. 2-4, paragraphs 1-5, 20 of habeas corpus petition). If the Government has confidential information that the respondent was married in Hungary (Brief, p. 30), it is a little too late to reveal it at this stage of the proceeding.

2. That the primary basis for the exclusion of the respondent without a hearing was his innocent membership in the International Workers Order (R. 3). The Government seeks to call this a self-serving declaration in its brief (p. 35) but the allegation was not denied in the Return and stands admitted.

3. That there is no basis for denying respondent a hearing because of confidential information (R. 3). The Return contains no denial whatsoever of this allegation but merely recites the history of the prior writs of habeas corpus and the administrative ruling herein (R. 5-8).

4. That there is no country in the world which is willing to accept the respondent (R. 4, 5, 19-20). The respondent as well as the Government have been unable to find a foreign country willing to take him. In addition, efforts of the French Line with consulates of various European nations and with the International Refugee Organization brought no results (R. 12). The Government cannot upon this record and the findings of the courts below, maintain the position set forth at page 30 of its brief that respondent might successfully gain entry into some iron curtain country. Moreover, respondent is not required by any provision of law to

seek entry into any country other than France and England, the countries whence he came. (8 U.S.C. 154). Both of these countries have refused to accept him.

5. That the Government is unable to return respondent to the country whence he came. This is admitted at page 4 of the Government's brief.

6. That failure to release respondent will result in his indefinite detention and even for the rest of his life. (R. 4, paragraph 23). In its brief (pp. 9, 28, 31), the Government admits that there will be no limit to the continuance of respondent's detention (if his present parole is revoked) "other than the statutory time limit on the authority of the Attorney General to exclude him." In this connection it should be observed that if the present exclusion is valid, respondent will need a visa or reentry permit to return here—and there is little hope that either document will ever be granted to him until his name is cleared.

Point II

An Alien in Exclusion Proceedings May Not Be Detained An Unreasonable Length of Time

(*A*). *Place of Deportation in Exclusion Proceedings.*

An alien in exclusion proceedings is deportable only to the country whence he came (8 U. S. C. A. 154). In *Wah* v. *Shaughnessy*, 190 F. 2d 488, the court held that 8 U. S. C. A. 156 as amended by Section 23 of the Internal Security Act of 1950 does not apply to exclusion cases. Accordingly the Government does not have the wide range of countries to which it may deport an alien in exclusion cases as it does in deportation cases. The country whence an alien came includes either the country from which he embarked to the United States or the country of his citizenship.

See: *U. S. ex rel. Consola* v. *Karnuth*, 63 F. Supp. 727 at 730.

Some of the reported decisions have erroneously stated that this also includes the alien's country of nativity. However, in *Bellaskus v. Crossman*, 164 F. 2d 412, the Government in the Supreme Court, October 1948 Term, conceded that such interpretation was erroneous and upon the confession of error of the Solicitor General, the Supreme Court reversed (335 U. S. 840).

In the instant case, respondent was born in Great Britain and assuming that he may still be a citizen of Great Britain and therefore deportable there the documentary evidence discloses (R. 10-11) that England has refused to accept him. Significantly, the Government fails to allege in its Return that respondent is a citizen of Hungary or that he was even domiciled there. There is therefore no basis for returning respondent to Hungary even if the Government alleged, as it does not, that it was making immediate preparations to ship him there. If respondent ever were a citizen of Hungary,—and it is doubtful that he ever was since it is believed that his parents are Rumanian—nevertheless he would have lost his Hungarian citizenship in 1933 by reason of his absense from that country. (R. 8). It is therefore submitted that it becomes immaterial whether respondent asserted that he would make no further efforts to depart as alleged in the brief of the government (p. 31) and in paragraph 13 of the Return. (R. 7). Moreover the courts below accepted the documentary proof offered by respondent to indicate that he had made bona fide efforts to secure entrance to 15 other countries. (R. 21, 30). A person detained at Ellis Island by the Government of the United States on the ground that his entry would be prejudicial is handicapped and blacklisted from successful negotiations with other countries. The petition for habeas corpus alleges (Par. 21) that there is no country to which respondent can be deported. This allegation is deemed admitted by

the Government because of its failure to controvert it, *Whitten* v. *Tomlinson*, 160 U. S. 231, 242. In any event it is clear that the Government has had more than a reasonable opportunity to make arrangement to deport respondent to the country whence he came pursuant to 8 U. S. C. 154. For almost three years it has been unsuccessful and there is no indication that it can carry out the command of the statute to deport respondent to the country whence he came within the foreseeable future. Petitioner does not state in its Return or Brief that respondent is today a citizen of Hungary. Although the statute does not permit deportation to Hungary unless respondent is a citizen thereof, the Government sought to defend the writ of habeas corpus upon the ground that it has been negotiating with that country. Moreover, it may be noted that the Hungarian Government has a notorious reputation for refusing to receive the return of its own subjects. In testimony before the House Appropriations Committee, 82nd Congress, relating to the Department of Justice appropriations for 1952, at page 411, the Immigration Service advised Congress that 101 cases had been refused admission to Hungary pursuant to orders of deportation as of February 21, 1951.

(B.) Power to Detain in Exclusion Cases.

In the cases of alien enemies, the Attorney General is given statutory power to detain aliens of hostile countries. By express language contained in the statute which is derived from the war power of Congress, alien enemies may be detained. And, as noted by petitioner (Brief, p. 28), protracted detention of dangerous alien enemies is not subject to judicial interference. *Ludecke* v. *Watkins*, 335 U. S. 160; *U. S. ex rel. Schwartzkopff* v. *Uhl*, 137 F. 2d 898.

The power exercised in the

sional power over aliens of friendly countries. It is not a war power but is now a part of our permanent peacetime legislation (8 U. S. C. A. 137-4). It is a power over immigration which is said to stem either from the concept of sovereignty as known in international law (*Nishimura Ekiu* v. *United States*, 142 U. S. 651) or from the power to regulate commerce with foreign nations (*Turner* v. *Williams*, 194 U. S. 279). Under Section 20(a) of the Internal Security of 1950 (8 U. S. C. A. 156-a) and section 242-c of Public Law 414, 82nd Congress, authority is granted to the Attorney General to detain an alien for six months and no more after the entry of an order of deportation in *expulsion* proceedings. There is no statutory provision whatsoever in *exclusion* proceedings authorizing detention after an order of deportation. The power to detain an excludable alien has been read into the statute. It is a power which is considered a necessary incident of the authority to exclude and it is a power which has been limited to reasonable periods of time ever since *Wong Wing* v. *United States*, 163 U. S. 228.

The right to detain an alien in an immigration proceeding was the subject of early comment by the Supreme Court in connection with the Chinese Exclusion Act of 1892 (27 Stat. 25). In *Wong Wing* v. *United States, supra*, the Supreme Court said at page 235:

> "We thing it clear, that detention or *temporary confinement*, as part of the means necessary to give effect to the provisions for the *exclusion* or expulsion of aliens would be valid."

And in line with this pronouncement of the Supreme Court, it has always been held, that where the government was unable to deport aliens, including those deportable on subversive grounds, their release would be directed. *Saksagansky* v. *Weedin*, 53 F. 2d 13 (C. C. A. 9; Alien

Communist); *Wolck* v. *Weedin*, 58 F. 2d 928 (C. C. A. 9); *Ex Parte Matthews*, 277 Fed. 857 (W. D. Wash.); *U. S. ex rel. Chumura* v. *Smith*, 29 F. 2d 287, (W.D. N.Y.).

The court below, therefore properly observed that (R. 31):

> "* * * the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty."

The district and circuit courts found that "no country has as yet indicated a willingness to accept Mezei" (R. 23, 30) and that his period of detention was unreasonable (R. 24, 31, 32). These findings were not and cannot be controverted. They will not be set aside on appeal unless clearly erroneous. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342; *Orvis* v. *Higgins*, 180 F. 2d 537 (C. C. A. 2). The Government seeks to justify the continued detention of the respondent upon three grounds, *i.e.*: (1) That this is an exclusion case where an alien has no constitutional rights, (2) That this is a case of a subversive alien and (3) That the Immigration Service is merely acting as a custodian for the Steamship Company and exclusion is not detention in "the usual sense."

(1). An Excludable Alien May Not be Detained an Unreasonable Period of Time.

The Government admits that the applicable statute is silent upon its power to detain an excluded alien. (Brief, p. 23). The power to detain an excludable alien which is read into the statute as a necessary incident to the power to exclude, should likewise be confined as *Wong Wing* v. *United States*, *supra*, suggests, to a power to detain temporarily for a reasonable time. The courts below so

construed this power, and such construction may be made as a matter of statutory construction apart from constitutional considerations. But, respondent does assert in addition, that the constitution protects all persons in the United States against unreasonable detention whether they be at Ellis Island or in Texas.

Ellis Island is of course part of the United States. It is situated in New York Harbor and in the Southern District of New York. The Federal Government assumed control of the island in 1808. Although the Immigration and Naturalization Service initiated supervision of Ellis Island in 1891, the island has nevertheless continued to be American territory. (Encylopedia Americana.).

An alien at Ellis Island cannot have his property taken away from him without due process of law. An alien detained at Ellis Island who assaulted an immigration inspector, would be entitled to constitutional protection at his criminal trial. We could not condemn a detainee for murder without a trial and without counsel. An immigrant at Ellis Island cannot be detained there for the rest of his life, merely because he is an alien seeking entry. An alien may have no standing to attack the constitutionality of an immigration statute because he has not been admitted as was the case in *Knauff v. Shaughnessy*, 338 U. S. 537. But, that is far short of saying that he has no constitutional rights whatsoever.

No legal legerdemain, no semantic straight-jackets, no voluble ventriloquism, can disguise the fact that respondent was confined and detained for two years upon American soil. The Government speaks of respondent's "so-called detention", of its lack of intent to detain, of "no confinement as such", and of "merely continuing the exclusion" of respondent. (Brief, pp. 9, 18, 27, 37). In law, says the Government, respondent "is still stuck at the border".

(Brief, p. 18) and it would promptly treat him as though he were upon foreign soil for all purposes. If the Government's unrealistic assumption were true, respondent could not even bring on a writ of habeas corpus in the Southern District of New York. How can he even claim that he was detained, no less in New York, if he was stopped at the border and is not here?

Mr. Justice Holmes regarded an alien, detained at or paroled from Ellis Island "as stopped at the boundary line" in interpreting residence under our naturalization statute in *Kaplan* v. *Tod*, 267 U. S. 229. Arrival at or parole from Ellis Island is not lawful admission to the United States, a prerequisite for naturalization. Mr. Justice Holmes was the last person in the world however to believe that the "boundary line" concept should be turned into dogma and "cease to provoke further analysis." (Holmes J., dissenting, in *Hyde* v. *United States*, 225 U. S. 347, 384, 391; Frankfurter, J, concurring, in *Dennis* v. *United States*, 341 U. S. 543). In *Chin Yow* v. *United States*, 208 U. S. 8, 12, 13, Mr. Justice Holmes, refused to apply the fiction of the "boundary line" doctrine and his explanation indicates why fact and not fiction should be applied to the instant case. It was there said:

> "If we regard the petitioner, as in Ju Toy's case (United States v. Ju Toy, 198 U. S. 253, 263 (1905)) it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction . . . still it would be difficult to say he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried back to China . . . *It is true that the petitioner gains no additional right of entrance by being allowed to pass the frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look at the actual facts.* De facto he is locked up until carried out of the country against his will." (Italics supplied).

Respondent was detained for two years . . . a period which is obviously an unreasonable length of time. It is submitted that his continued detention under these circumstances was illegal as found by the courts below. In *U. S. ex rel. Chu Leung* v. *Shaughnessy*, 88 F. Supp. 91, the District Court, in an exclusion proceeding commented that "a District Court has the power to release from custody an alien who has been detained an unreasonably long period of time by the Department of Justice after it has become apparent that the warrant for his deportation cannot be effectuated."

In *In re Krajcirovic*, 87 F. Supp. 379, an alien arrived as a stowaway without a passport and was ordered excluded. He was given the same option which the Government contends respondent has, namely to remain in detention or to go to any country that would accept him. He could be returned to Czechoslovakia where he would be executed. Judge Wyzanski said in holding that the alien could only be held for a reasonable time to effectuate deportation:

> "The District Director contends that Krajcirovic is not confined because the Department of Justice has given him the opportunity to depart voluntarily to any place outside the United States. . . . In my opinion this contention rests on an unsound factual basis. Krajcirovic has not at the present time a passport or a visa for any country. While he is in the East Boston station he cannot effectively apply for a visa, at least without the cooperation of the Department of Justice. Even with such cooperation there is no showing that any country except possibly the land of his birth, Czechoslovakia, would admit him. If he did return to Czechoslovakia, he would be executed. . . . In short the option presented by the Department of Justice to Krajcirovic is a Hobson's choice—permission to go home and be executed.

* * * * * * *

"But for the court to refuse to enlarge an alien who is being held by the immigration authorities without his consent, without statutory authority and for some purpose other than reasonably prompt deportation would be to deny him a fundamental constitutional right. For wherever the constitution of the United States is applicable, and that includes ports of entry, an alien as well as a citizen is guaranteed that he will not be deprived of his liberty without due process of law." (Italics supplied.)

In *Staniszewski* v. *Watkins*, 80 F. Supp. 132, an alien was excluded on the criminal ground in that he had been convicted of a crime involving moral turpitude. Judge Leibell, in sustaining a writ of habeas corpus, said as follows:

"What is to be done with the petitioner? The government has had him in custody almost seven months and practically admits that it has no place to send him out of this country. . . . I am most concerned with the seemingly helpless status of the petitioner and the failure of the proper officials to find a means of releasing petitioner from confinement at Ellis Island. I intend to sustain the writ of habeas corpus and order the release of the petitioner on his own recognizance. . . . If the government does succeed in arranging for the petitioner's deportation to a country that will be ready to receive him as a resident, it may then advise the petitioner to that effect and arrange for his deportation in the manner provided by law."

In *Petition of Brooks*, 5 F. 2d 238, the court in discussing the power of immigration authorities to hold an alien either in exclusion or in deportation proceedings for an indefinite period of time said as follows:

"The right to arrest and hold or imprison an alien is nothing but a necessary incident *of the right to exclude or deport*. There is no power in this court or in any other tribunal in this country to hold indefi-

nitely any sane citizen or alien in imprisonment except as punishment for crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation or exclusion proceedings are not punishment for crime."

Generally, during periods where shipping facilities are available, periods in excess of four to six months have been held unreasonable, while during war time when shipping facilities were unavailable, periods in excess of a year are held unreasonable. Here shipping facilities are available and even if they were not, certainly a period of detention of two years is unreasonable.

See: *Staniszewski* v. *Watkins*, 80 F. Supp. 132; *U. S. ex rel. Ross* v. *Wallis*, 279 Fed. 401, 403; *Moraites* v. *Delany*, 46 F. Supp. 425, 431.

The Government seeks to deny the applicability of the foregoing cases and relies upon *Knauff* v. *Shaughnessy*, 338 U. S. 537. The *Knauff* case concerned the power of Congress and the Immigration officials to exclude an alien. There was no problem of illegal detention because of inability to deport Mrs. Knauff. Mrs. Knauff was born in Germany and deportation could be effectuated to Germany. Nor is the problem here involved, one where the alien seeks to attack the constitutionality of an exclusion statute. As noted by the court in *Chu Leung* v. *Shaughnessy*, [supra], and by Judge Wysanski in *U. S. ex rel. Janavaris* v. *Nicolls*, 47 F. Supp. 201, we are here concerned with the power of the court to enlarge an alien who has been held an unreasonably long period of time, a power which the court unquestionably has. An alien thus enlarged is not admitted to the United States, but his prison bounds are enlarged. *Kaplan* v. *Tod*, 267 U. S. 229.

There is neither statutory nor constitutional power to detain respondent in the instant case for the indefinite

duration of the emergency (which has continued since 1941) *or as long as any two foreign states are at war.* (22 U.S.C. 223 Section 215, Public Law 414, 82nd Cong.; 66 Stat. 190). Habeas corpus properly permits his release to prevent unwarranted and illegal detention.

Apart from the judicial power to direct release because of unwarranted and illegal detention, is the power of the court to review the denial of administrative bail or parole, where such denial is founded upon abuse of discretion. *Potash* v. *District Director*, 169 F. 2d 747; *U. S. ex rel Pirinsky* v. *Shaughnessy*, 177 F. 2d 708. Where an alien's deportation or exclusion cannot be effectuated, it is an abuse of discretion for the Government to continue his detention. Until the post-World War II hysteria and panic seized our Immigration and Naturalization Service, excluded aliens—even those with questionable political backgrounds—were routinely granted parole where they had no place to which they could return.

The Government's assertion that under existing law, administrative bail or parole in exclusion cases is authorized only for witnesses in criminal prosecutions (Brief, pp. 24, 25) is less than a frank disclosure of existing and long standing administrative interpretation of the statute. As far back as 1915, Esther Kaplan, excluded because of mental deficiency, was placed on parole by immigration authorities (*Kaplan* v. *Tod*, 267 U. S. 229). From that year at least, until today, the practice of the immigration authorities has been to parole excluded aliens, even though they were not prospective witnesses in criminal trials. The Immigration Manual of the Immigration and Naturalization Service, published in 1944 contains the following at pages 5169-5170:

> "An alien who arrives at a port of entry, applies for admission, and is excluded may, when the dictates of

humanity demand such action, be paroled into the United States.

The parole of an inadmissible alien, under proper conditions or safeguards, may be authorized by the port authorities——

(A) For an alien wife of a United States citizen, resident of the United States, who has accompanied her husband abroad and innocently failed to obtain an immigration visa or to conform to the requirements of law.

(B) For registry. . . . (A method of legalizing the status of an alien)

(C) For criminal prosecution in the United States.

(D) For emergency medical or surgical treatment.

(E) In such other exceptional cases in which to do otherwise would be inhuman or hold the Service up to ridicule."

Respondent cannot be deported because there is no receiving country. He cannot be placed aboard a ship and assume the role of a Flying Dutchman, because there is no statutory authority for such action. He must be returned to the place from whence he came, and the statutory mandate cannot be accomplished. He cannot be detained indefinitely. The dictates of humanity, the constitution and the law, require that the respondent be at large until exclusion can be effectuated.

(2) *An Alleged Subversive Alien Is Entitled to Enlargement or Parole.*

The government in addition to arguing that the court had no power to enlarge the respondent as a matter of law, also argues and states in its Return that the respondent is a security risk (R. 8). Respondent alleges facts upon

which the court may evaluate this allegation. He states —and it is not denied—that he has been residing in the United States for 25 years, and that he has assisted our war effort during this period of time and that he has an American born wife (R. 2). For over 25 years petitioner was at large in the United States and the internal security of the country was not endangered. The walls of the republic remained unshaken. The Government's allegations of security risk are merely conclusory in character and similar allegations have been criticized by the courts. In *U. S. ex rel. Klig* v. *Shaughnessy*, 94 F. Supp. 157, Judge Ryan stated:

> "Particularly noteworthy in the government's return is the failure to even suggest that if relators are enlarged on bond they might be unavailable when needed in connection with their deportation proceedings. Apparently, revocation of bail is sought to be justified solely on the claim that relators constitute a 'security peril.' But not a scintilla of evidence relating to any recent activity on the part of relator has been adduced to substantiate this general allegation. . . ."

See also: *Ex parte Senter*, 94 F. Supp. 77; *Ex Parte Estrada*, 93 F. Supp. 713.

In *U. S. ex rel. Pirinsky* v. *Shaughnessy*, 177 F. 2d 708, the Government contended that any member of a subversive organization was a security risk and would endanger the public safety upon enlargement. The Court of Appeals nevertheless pointed out that the Government had to show immediate or particular danger from the individual involved beyond that which might be expected from mere membership in a subversive organization.

Here, as in *U. S. ex rel. Heikkinen* v. *Gordon*, 190 F. 2d 16, 21 (dismissed as moot by the Supreme Court on November 10, 1952), detention is sought to be justified upon the ground of membership in the International Workers Order.

In the *Heikkinen* case, the Court of Appeals found that refusal by the Attorney General to enlarge an alien on bail upon the ground of such membership was arbitrary and an abuse of discretion.

In the instant case, the petition for habeas corpus alleges that the basis of exclusion herein was innocent membership in an organization which was then on the Attorney General's subversive list (International Workers Order) and which the Supreme Court later ruled was improperly on such subversive list (R. 3). *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 at 134. Applying the test of the *Pirinsky* and *Heikkinen* cases to the undenied allegations of the petition that the basis of exclusion herein was innocent membership in the International Workers Order, it is submitted that respondent was properly enlarged without danger to the internal security of the country.

The Government's contention (Brief, p. 19) that spies may thus enter the country is inapplicable in the instant situation. There is no allegation, nor any foundation, for any contention that this respondent is a spy. We are dealing not with someone who has been sent to the United States by a foreign government, but on the contrary with an individual who has had 25 years of residence here, who has an American wife here; and who returned to the United States with appropriate documents issued by an American Consul abroad. Even if he were a spy, which is not alleged here, we have criminal laws to deal with espionage and attempted espionage. The immigration statutes were not intended to displace those laws, and as we learned during the recent war, when Germany attempted to land espionage agents, our government was alert to deal with them outside our immigration laws. This case should be decided upon the allegations of the petition for habeas corpus, the return,

the documentary proof before the court, and not upon hypothetical situations.

The imagination can hardly create a situation more incompatible with the spirit of our free institutions than that one civil official's completely secret viewpoint could be the basis of sustained imprisonment. The unsubstantiated conclusory allegation of the government that respondent was a "security hazard" (R. 8) was properly deemed insufficient in the face of the undenied affirmative allegations of the petition for habeas corpus. The return should have alleged facts, not mere conclusions of law. *Stretton* v. *Shaheen*, 176 Fed. 735. By its return, the government should have certified "the true cause of detention" 28 U. S. C. 2243. See, *Longsdorf, Habeas Corpus—A Protean Writ and Remedy*, 10 Ohio St. Law Journal, 301, 310-312. The statute governing habeas corpus does not permit the continued detention of an individual to be justified upon secret administrative determinations, the cases do not permit it, and the national security does not require it.

In keeping with the demands of justice and to adjust the situation to the vigorous unsupported conclusory allegation that the respondent was a security hazard, the District Court offered the Government an opportunity to substantiate its claim *in camera*. (R. 25). This opportunity was refused, apparently because our immigration officials believed that so-called confidential information, (about which a word will be said later) can not in the best interests of the United States, be revealed even to the judiciary.

The objection that revelation would prejudice the national security is not present when the technique of an *in camera* hearing by the court is available. *In camera* hearings were adopted as a judicial technique in admiralty proceedings during World War II. [316 U. S. 717 (1942,

adopted), 328 U. S. 882 (1946, suspended), *United States* v. *Leahy*, 148 F. 2d 462, 463 note 1.]

The Government has been called against its objections in an increasing number of cases to produce so-called confidential information in the interests of justice. Thus, a motion to produce relevant documents is available against the government, despite objections against disclosure. *United States* v. *Cotton Valley Operators Committee*, 9 F. R. D. 719, affirmed by an equally divided court in 339 U. S. 940. See also: *United States* v. *Schneiderman*, 21 Law Week 2069. In criminal prosecutions, the Government must support its charges by revelation, or forego the prosecution. *United States* v. *Andolschek*, 142 F. 2d 503; *United States* v. *Keown*, 19 F. Supp. 639.

In *United States* v. *Coplon*, 185 F. 2d 629, 638, cert. denied 342 U. S. 920, Judge Learned Hand observed:

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens."

This doctrine of compelling disclosure by the government, based upon waiver of nondisclosure by the institution of suit and elementary justice, has been applied to the cases of aliens in habeas corpus proceedings. In *U. S. ex rel Schlueter* v. *Watkins*, 67 F. Supp. 556, affirmed, 158 F. 2d 853, the District Court made the following comments:

> True, the United States is not the plaintiff in such a proceeding (habeas corpus) and hence cannot be said to waive the privilege by virtue of instituting the action; but the United States did take the action, i.e. detaining the petitioner, which is the subject of review. Moreover the theory of waiver upon which the requirement of disclosure has been based seems to me to be the kind of useful fiction which the law invents to express an underlying public policy. That public policy

is that a person should not be deprived of his liberty without giving him an opportunity to have access to the material which might exculpate him."

In *U. S. ex rel Lee Till Seem* v. *Shaughnessy*, 104 F. Supp. 819, the use of the *in camera* procedure revealed not only that the relator was unlawfully detained but also that the so called confidential information was not confidential at all and could have been revealed without endangering security. Respondent has alleged in the instant case, that the so called adverse information can properly be revealed without danger to the internal security of the nation (R. 3). He has alleged affirmative facts to indicate that he is not a security risk. The neglect of the government to allege facts supporting its general conclusion of security hazard and its refusal to reveal substantiating evidence *in camera* supports the charges made herein, that the adverse information is inconsequential as intimated by the courts below. In any event, the government's course of action prevented the courts below from reaching any other conclusion. The only evidence before the District Court revealed that respondent was not a security risk. In determining whether to release him in habeas corpus proceedings, (and assuming that he was properly excluded) the District Judge, was entitled, if not compelled, to act upon the evidence—the undenied factual allegations of the petition for habeas corpus. Upon this record, no conclusion of security risk, is warranted. Upon this record, the courts below, properly determined to grant bail to respondent.

(3) The Responsibility for the Respondent's Continued Detention and for His Removal to the Place From Whence He Came is Upon the Government.

In the realm of fancy and fiction, the Government makes three contentions. First, it insists that the respondent has

been stopped at our border and is not upon American soil. We have indicated the fallacy of this contention. Secondly, it observes that respondent was not really detained or confined. It admits that at the present time his liberty should be restrained at Ellis Island because no country will take him but in the same breath it adds that in a sense the United States is no more restraining him than France or England. The only difference is said to be that we are "providing the respondent with shelter and food". (Brief, p. 18, and note 8). The District Court rejecting this contention stated: "This, in view of the clear documentary evidence that Mezei cannot gain admission anywhere, hardly jibes with the usual cold realism of immigration policies." (R. 22). Even if respondent were still aboard ship instead of at Ellis Island, as was the case when the writ of habeas corpus was issued, he would have been restrained of his liberty. That was decided as far back as 1884 in the case of *In re Chow Goo Pooi*, 25 Fed. 77, 78 where it was said:

> "We are unanimously of opinion that when a Chinese person is detained on board of a ship and refused the right to land, whether by the authority of the master in pursuance of the provisions of the Chinese restriction act, or by the refusal of the collector to grant him permission to land, he is restrained of his liberty under or by color of the authority of the U. S., and that he is entitled as of common right to sue out a writ of habeas corpus, that the legality of his detention and restraint may be passed upon by the court." See *U. S. ex rel Belardi* v. *Day*, 50 F. 2d 816.

Finally, the Government insists that its work is done when it enters an order of exclusion (Brief, p. 27 et seq.). The mandate of the statute, however, is not only for the Attorney General to exclude inadmissible aliens, but also to send them back "to the country whence they respectively

came." (8. U. S. C. 154). There is no provision permitting the creation of a Flying Dutchman.

The Government cannot simply execute one half of the statutory mandate and sit idly by with the respondent in detention for the rest of his life. Respondent's present predicament is due to the invitation, privilege, or call-it-what-you-will, given to him in the form of a visa, to reenter the United States. He came here in good faith seeking reunion with his family and found himself detained at Ellis Island without notice or charges, and without an opportunity to be heard. As noted by the Circuit Court of Appeals (R. 34):

> "* * * the plight of the relator is actually much worse that if the charge against him had been formulated as one for indictment and criminal prosecution; for then he would have had the ordinary safeguards of judge and jury and face at least a definite punishment."

In every sense of the word, respondent was detained and restrained of his liberty and his failure to be at large in the United States or elsewhere was a situation which was not of his own making. The fact that the expenses of his detention were being paid by the steamship company, did not relieve the government of responsibility. The statute places the enforcement of our immigration laws upon the Attorney General and his subordinates. Because of factors beyond the control of respondent and the government, it is not possible to enforce the mandate of the statute to deport in the instant case. Continued and unreasonable detention in a civil proceeding like this is neither warranted by the statute nor under our democratic form of government. Respondent is entitled to his liberty until deportation becomes feasible.

Point III

Respondent's Continued Detention Without a Hearing Was Illegal

In its petition for certiorari (p. 9) and its brief (p. 10), the Government, apparently oblivious of the record herein, asserts that the exclusion order itself is not under attack. It was attacked in the courts below (R. 21) and is under attack here.

Paragraphs 9 to 13 of the petition for a writ of habeas corpus (R. 3) allege that there is no confidential information which cannot be disclosed and that the only basis for exclusion is innocent membership in the International Workers Order. These allegations were not denied and stand admitted. No classified information could have been revealed had the Government alleged in its return that other grounds existed for the exclusion of respondent. It did not deny these allegations because they are true. And if they stand unrebutted as they must, the Attorney General is acting contrary to the mandate of Congress and his own regulations which require that there be confidential information which would endanger security or conflict with the national interests, if revealed. Under these circumstances, the denial of a hearing is contrary to law. (Of course, if a returning lawful resident is entitled to a hearing, then respondent has an additional ground for contesting his exclusion without a hearing. This issue is before the Court, in *Chew* v. *Colding*, No. 17, this Term).

Respondent is not barred from questioning the legality of the denial of a hearing to him by reason of the denial of prior writs herein. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 240. It is true that in alien enemy cases, there may be no review of abuse of discretion *Ludecke* v. *Watkins*, 335 U. S. 160. But in immigration cases there may be a review of abuse of discretion. *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999. And it follows

as a necessary corollary that where the administrative officers of the government have improperly interpreted immigration statutes or regulations issued thereunder, and neglected to follow them, judicial review is permitted even in exclusion cases. *Geigow* v. *Uhl*, 239 U. S. 3.

Respondent does not question the right of the Attorney General to enter an order of exclusion against him where the Attorney General complies with the statute and the regulations pertaining to the same. He does not question the right of the immigration authorities to exclude an alien without a hearing when a finding is made in good faith that a hearing will result in the disclosure of confidential information which would be prejudicial to the best interests of the United States. In the instant case, unlike *Knauff* v. *Shaughnessy*, 338 U. S. 537, respondent has alleged that the Attorney General has acted capriciously, that he has excluded him without a hearing because of innocent membership in the International Workers Order, and that there is no basis for denying a hearing on the ground of confidential information (R. 3). The Immigration officials in the instant case in excluding respondent in 1950 relied upon his membership in the International Workers Order in view of its subversive listing by the Attorney General, a listing which the Supreme Court later ruled improper on April 30, 1951. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 134.

In addition, a review of immigration procedures and practices makes one wonder whether arbitrary despotism, insane panic or hysterical nonsense, rather than common sense control determinations to deny hearings. The facts are as follows:

1. Edward J. Ennis, formerly Director of the Alien Enemy Control Unit, in the Department of Justice, and the first administrative official to be vested with the power to deny aliens entry without a hearing, testified as follows

before the President's Commission on Immigration and Naturalization on September 30, 1952:

> "*Exclusion on secret denunciations*—The Ellen Knauff case (338 U. S. 537) dramatized the problem of exclusion of arriving aliens on the basis of confidential information 'the disclosure of which would be prejudicial to the public interest' (8 CFR 175.57). Originally these regulations were published in November 1941 while the war was raging in Europe for the purpose of dealing with exceptional and extraordinary spy cases which might arise. It was believed that the requirement that the Attorney General certify that disclosure would be against the public interest would insure the most sparing use of this extraordinary procedure. It was not thought at the time that after the end of hostilities this procedure might be used in the relatively large number of cases involving persons not a serious menace to our safety. Unfortunately the Knauff and similar cases suggests that the certification safeguard has not been wholly satisfactory and that the exceptional authority has been delegated to subordinates who may not fully appreciate the gravity of condemning an individual on secret evidence. The dangers of this procedure are best realized by reading the opinion of the Board of Immigration Appeals in the Knauff case (conveniently contained as an appendix to 'The Ellen Knauff Story') which analyses the evidence upon which the alien was deprived of her liberty for more than a year."
>
> See also: *Must Liberty Bow Her Head in Shame?*, Reader's Digest, August 1952, p. 4.

2. Immigration statistics reveal that in the past 3½ years over 500 aliens have been excluded without a hearing (Hearings, before the President's Commission on Immigration and Naturalization, p. 1965). Most of these exclusions occurred at the Canadian border. Acting upon hearsay supplied by the Royal Mounted Police, without knowledge of the authors of the adverse information, and oft-times without any verification of the authenticity of these

hearsay reports, our immigration officials exclude without a hearing.

3. In the interests of security, all names of individuals are considered confidential. Thus in the foreword to Volume I of its published decisions, the Immigration Service remarks that its records are considered confidential and therefore the names of persons are omitted from its decisions. At page 391 of Volume I, reference is made to the case of I- T-, 36 Ops. Atty. Gen. 535. The name of *Ingrid Tobiassen*, well known to the bar in view of the discussion in *Perkins* v. *Elg*, 307 U. S. 325, thus is a state secret. In mimeographed releases of its decisions, however, the non-disclosure of confidential names, reaches its climax. Thus, Interim Decision No. 94, only dares refer to Congressman K— in recalling his statement about the Displaced Persons Act on the floor of Congress on June 10, 1948. And, Interim Decision No. 96 of the Immigration Service, has the boldness to mention the name of the book, "I Saw Poland Betrayed", but can only indicate its author as A— B— L—. It is therefore readily apparent, that all informants of the Immigration Service, whether they be Congressmen who accuse on the floor of the House or authors who publish their denunciations in books available to the public, are "confidential informants," whose accusations cannot be revealed in the public interest.

4. In *Lee Till Seem* v. *Shaughnessy*, 104 F. Supp. 819, confidential information revealed to the court *in camera*, was found to be utterly undeserving of such classification.

5. In hearings before the Senate Subcommittee on Immigration, in connection with the amendment to the Displaced Persons Act of 1948, a top immigration official of the Immigration Service, Mr. Almanza Tripp, testified on February 15, 1950 under oath as follows at pages 664 and 665:

> "In the first place, there are almost no cases where we have absolute proof that a person is subversive.

We have had many cases where there is doubt. Now of the doubtful cases, I have referred probably between 5 and 10 to our central office under a special procedure provided for by section 175.53 and section 175.57, 8 C. F. R., which authorizes the Attorney General to exclude without hearing.

* * * * * * *

"So, in those cases, even though the evidence is weak—although in some cases it is a little stronger than others—I am reluctant to pass them unless we can prove that that person is a good security risk.

* * * * * * *

"Now some of the information from central registry might allege that this particular displaced person has been engaged in communistic activities. . . . The source of the information is no longer available. Now when we have a case of that sort where central registry contains something of a derogatory nature, I do not believe we should make a finding of admissibility until it is disproved. But the evidence that they had in central registry would not be sufficient to exclude by the normal board of special inquiry proceedings because those proceedings must be conducted in a manner in which they could not be subject to attack in a court of the United States.

"You may say that it is unfair to the applicant not to give him that protection, but you must remember that the applicant is an applicant. He has no rights. I think it is well within our province to select only those whom we feel are desirable."

In view of the foregoing, it would appear that the practice of the Immigration Service is not to deny a hearing because of a finding that the disclosure of confidential information would be against the best interests of the United States but rather because of a realization that to grant a hearing

would mean that they must reveal the weakness of their case against an alien. The regulations, 8 C. F. R. 175.57, specifically require a finding that the Government is unable to disclose confidential information because it would result in prejudice to the best interests of the United States. This obviously means a finding made in good faith with some basis in fact. Significantly, in the instant case, beyond a conclusory statement that the information cannot be revealed, there is not a scintilla of evidence or of factual basis to indicate that the disclosure of information would expose a confidential informant or impair his future usefulness. Here again, it is respectfully submitted that the government's Return should state some facts upon which it could be logically concluded that the denial of a hearing was based in good faith upon a belief by the Immigration Service that such hearing would result in a disclosure of confidential information which would prejudice the public interest.

If the *Knauff* case is any guide, it may be noted that *after* the Attorney General contended that a hearing would disclose confidential information and be contrary to the public interest, he granted her a hearing which resulted in her admission to the United States (20 L. W. 2194).

In view of the foregoing, the sworn testimony of Almanza Tripp, it is respectfully submitted that respondent is entitled on this record to a hearing and counsel believes that the imagination can hardly create a situation more incompatible with the spirit of our democratic institutions than the practice and procedure described by Mr. Tripp. Counsel believes that if the Immigration Service is to justify the continued detention of respondent at Ellis Island, as an arm of our democratic government, it owes the court, the public and the respondent the duty of coming forward with some more substantial basis than it has to justify the further imprisonment of respondent.

Conclusion

If the fate of the respondent alone were to be decided by this case, it would be of small moment. Our democratic processes themselves are at stake. On December 15, 1952, President Truman observed that:

> "Hysteria impels people to destroy the very thing they are struggling to preserve. * * * For us to embrace the methods and morals of communism in order to defeat Communist aggression would be a moral disaster worse than any physical catastrophe."

See also:

Stack v. *Boyle*, 342 U. S. 1, 6.
O'Brian, New Encroachments on Individual Freedom, 66 Harvard Law Review 1, 26.

The Court below properly found the detention of respondent illegal and appropriately observed (R. 34):

> "If in fact our country needs so drastic a restraint as this, violative of all our concepts of due process, against this individual thus situated, then it would indeed seem admitted, as a former distinguished Attorney General has pointed out, that 'our institutions do not have the sturdiness which our words to the rest of the world announce, and will falter under the greater impact of the alien dogma.'"

Respectfully submitted,

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